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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944 45

No. 979 40

DEFENSE PLANT CORPORATION, APPELLANT

vs.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED FEBRUARY 24, 1945

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OCTOBER TERM, 1944

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1 In the Court of Common Pleas of Beaver County, Pennsylvania

No. 320, June Term 1943

IN RE APPEAL OF DEFENSE PLANT CORPORATION FROM ASSESSMENT OF PROPERTY IN THE TOWNSHIP OF BOROUGH, COUNTY OF BEAVER, PENNSYLVANIA

Docket entries

APPEAL FROM PROPERTY ASSESSMENT

April 30th, 1943, petition of Defense Plant Corporation from assessment of property in the Township of Borough, County of Beaver, Pennsylvania, presented and Order of Court made, to wit: And now to wit: April 30th, 1943, upon consideration of the within petition and upon motion of Reed and Ewing, attorneys for the appellant, a hearing on said appeal is fixed for the 25th day of May 1943 at 9:00 o'clock A. M. Notice of said hearing shall be given to the County Commissioners acting as a Board of Revision.

By the Court,

FRANK E. READER, *P. J.*

April 30th, 1943, service of copy received and notice accepted for Board of Revision by John G. Marshall, County Solicitor of Beaver County, Pennsylvania.

May 25, 1943, at nine o'clock A. M. Eastern War Time,
2 this being the time fixed for a hearing in the above Appeal on motion of Harold F. Reed of Reed and Ewing of counsel for appellant, concurred in by J. G. Marshall, Solicitor for Beaver County, said hearing is continued until Thursday, June 24, 1943, at nine o'clock A. M. Eastern War Time.

By the Court,

FRANK E. READER, *P. J.*

June 24, 1943, stipulation of counsel filed.

June 25, 1943, Argued C. A. V.

June 29, 1943, Testimony filed.

July 8th, 1943, certificate filed to wit: In accordance with the provisions of the Act of March 5th, 1943, and Supreme Court Rule 52, it is hereby certified that the Appellant's interest in the amount really in controversy in the above entitled case exceeds the sum of $2,500.00 exclusive of costs.

By the Court,

FRANK E. READER, *P. J.*

August 5th, 1943, it being made known to the Court that in the testimony of J. E. White on page 92 of the Record, the following statement appears in answer to a question:

"This identification is accepted by means of Serial Inventory numbers marked in private places on the equipment as well as affixing a tag which clearly identifies that piece of property as the property of the Defense Plant Corporation."

3 And it being the recollection of counsel for Defense Plant Corporation that the said J. E. White used the word "prominent" and not "private"; and that Mr. J. E. White has written a letter stating that his recollection is that he did use the word "prominent" and not "private," on motion of Harold F. Reed, Esq., of counsel for Defense Plant Corporation, the record is amended by changing the word "private" in the answer of J. E. White at page 92 above recited to "prominent."

By the Court,

FRANK E. READER, *P. J.*

I, John G. Marshall, Esq., do not recall whether the witness, J. E. White, used the word "private" or the word "prominent" in response to a question which answer appears on page 92 of the testimony and being the third answer on that page, and I do not think it matters which of the two words was used by the witness.

(Signed) JOHN G. MARSHALL,
Attorney for the County of Beaver.

June 8th, 1944, opinion filed and Order of Court made to wit: Now to wit; June 7th, 1944, it is hereby ordered, adjudged, and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assessment of said land as made by the assessor and confirmed by the County

4 Commissioners of Beaver County acting as a Board of Tax Revision and for said County be and the same hereby is approved; the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court,

FRANK E. READER, *P. J.*

Same day an exception is granted and bill sealed to Defense Plant Corporation.

FRANK E. READER, *P. J.* [SEAL]

June 12th, 1944, certificate filed to wit: Now June 12th, 1944, I hereby certify that the amount involved in the above entitled matter is in excess of $2,500.00.

FRANK E. READER, *P. J.*

June 26th, 1944. Order of Court filed to wit: And now June 26th, 1944, it having been brought to the attention of the Court that a question has arisen if the order of June 7th heretofore entered was a final order in view of the fact that it was signed Frank E. Reader, P. J., and it having been the intention of the Court that the order of June 7th be the final order, on motion of Reed and Ewing, attorneys for Defense Plant Corporation the order of Judge Reader of June 7th as follows:

"Now to wit: June 7th, 1944, it is hereby ordered, adjudged, and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assessment of said land as made by the assessor and confirmed by the County Commissioners of Beaver County acting as a Board of Tax Revision in and for said County be and the same is hereby approved; the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court,

FRANK E. READER, *P. J.*"

is reaffirmed as the order of the Court en banc.

FRANK E. READER, *P. J.*
HENRY H. WILSON, *Judge.*

Same day, an exception is granted and bill sealed to Defense Plant Corporation.

FRANK E. READER, [SEAL]
HENRY H. WILSON, *Judge.*

June 28th, 1944, Certiorari from the Supreme Court returnable to the last Monday of September, 1944.

June 29th, 1944, notice of appeal to the Supreme Court filed.

June 29th, 1944, service of the foregoing notice is hereby accepted by John G. Marshall, Solicitor for the County of Beaver, Pennsylvania, filed.

In Court of Common Pleas of Beaver County

Appeal from property assessment

Filed April 30, 1943

To the Honorable, the Judges of said Court:

The petition of Defense Plant Corporation respectfully represents:

1. Defense Plant Corporation is an integral part of the Government of the United States of America, duly or-

6 ganized and existing under the laws of the United States pursuant to Section 5d of the Reconstruction Finance Corporation Act (Act of June 19, 1934, c. 653, Section 5, 48 Stat. 1168–97), as amended, Title 15 U. S. C. 606b.

2. The Township of Borough is a first class township in Beaver County, Pennsylvania.

3. The County Commissioners of the County of Beaver, pursuant to the General County Assessment Law, Act of 1933, P. L. 853, Section 501, Purdon's Pa. Stat. Annot. Title 72 (5020-501), as amended, constitute the Board of Revision which hears appeals from assessments from Borough Township and other taxing districts in the County of Beaver.

4. Defense Plant Corporation owns certain lands, buildings, machinery, and equipment for the production of materials for purposes of National Defense and the prosecution of the war, situate in the Township of Borough, County of Beaver, Pennsylvania.

5. The Assessor for Borough Township assessed the property of the Defense Plant Corporation for real property taxes for 1943–45 Triennial period under Section 201 of the General County Assessment Law, Act of May 22, 1933, P. L. 853, as amended, Purdon's Pa. Stat. Annot., Title 72 (5020–201). An itemization of the property of Defense Plant Corporation assessed as aforesaid is as follows

7

9 acres of land @ $1,100	$9,900.00
24 acres of land @ $1,000	24,000.00
Plant Building including Cafeteria	338,000.00
Administration Building	32,000.00
Boiler house	60,000.00
Personnel Building	5,000.00
Machinery	388,000.00

6. Defense Plant Corporation appealed to the County Commissioners of Beaver County from the assessment made by the Borough Township Assessor against the property of Defense Plant Corporation on the grounds (a) that the Pennsylvania Statutes, to the extent that they impose a tax on machinery and equipment owned by Defense Plant Corporation are violative of the Constitution and Statutes of the United States, (b) that its land, buildings, machinery, and equipment are exempt from taxation under the Constitution and Statutes of Pennsylvania as public property used for public purpose.

7. The County Commissioners of Beaver County sitting as the Board of Revision heard Defense Plant Corporation's appeal on March 2, 1943, and, on March 3, 1943, dismissed the appeal as to the claims for exemption holding all of the property to be taxable, and reaffirmed the assessment made by the Borough Township Assessor.

8. The Act of Congress approved June 10, 1941, c. 190, § 3, 55 Stat. 248, U. S. C. A. Title 15 § 610, provides as to Defense Plant Corporation inter alia as follows:

8 "The corporation, including its franchises, its capital, reserves and surplus and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency or possession thereof or by any state, county, municipality or local taxing authority; except that any real property of the corporation shall be subject to state, territorial, county, municipal or local taxation to the same extent, according to its value as other real property is taxed."

9. The machinery and equipment of Defense Plant Corporation is personal property and does not constitute real property.

10. The action of the said Assessor and the said Board of Revision in assessing machinery and equipment owned by Defense Plant Corporation denies the validity of Section 10 of the Reconstruction Finance Corporation Act as amended by the Act of June 10, 1941 aforesaid.

11. The Statutes of the Commonwealth of Pennsylvania relative to the taxation of real estate to the extent that they impose taxes on said machinery and equipment, are invalid on the ground that they are repugnant to the Constitution of the United States, to wit: The immunity of the United States and its instrumentalities from taxation by states or political subdivisions thereof and are repugnant to Section 10 of the Reconstruction Finance Corporation Act, as amended.

9 12. The property of Defense Plant Corporation in Borough Township, Beaver County, Pennsylvania, is being used entirely for National Defense purposes and is all exempt from taxation as public property used for public purposes by virtue of the statutory exemption from taxation contained in the Act of May 22, 1933, P. L. 853, as amended, Purdon's Pa. Stat. Annot., Title 72, Section 5020-204, Subsection (g), enacted pursuant to Article 9, Section 1 of the Constitution of Pennsylvania.

13. The action of the said Assessor and the said Board of Revision in assessing land, buildings, machinery and equipment owned by Defense Plant Corporation denies the validity of exemption from taxation afforded by Article 9, Section 1 of the Constitution of Pennsylvania, and the Act of May 22, 1933, P. L. 853, as amended, Purdon's Pa. Stat. Annot., Title 72, Section 5020-204, Subsection (g).

14. The assessments aforesaid upon said machinery and equipment and upon the real property of Defense Plant Corporation in Borough Township are illegal and invalid for reasons aforestated.

Wherefore, your petitioner appeals from the decision of the County Commissioners of Beaver County, sitting as a Board of

Revision, in accordance with the Act of Assembly, and
10 prays your Honorable Court to strike said assessments from the assessment books.

DEFENSE PLANT CORPORATION,
By PAUL L. HOLDEN,
Attorney-in-Fact.

STERLING NEWELL,
HENRY J. CRAWFORD,
PAUL L. HOLDEN,
WARREN E. HACKER,
SQUIRE, SANDERS & DEMPSEY,
Cleveland, Ohio.

HAROLD F. REED,
REED & EWING,
Beaver, Pennsylvania.
Counsel for Defense Plant Corporation.

[*Duly sworn to by Paul L. Holden; jurat omitted in printing.*]

11 *Order*

And now, to wit: April 30, 1943, upon consideration of the within petition and upon motion of Reed and Ewing, attorneys for the appellant, a hearing on said appeal is fixed for the 25th day of May 1943 at 9:00 o'clock A. M. Notice of said
12 hearing shall be given to the County Commissioners acting as a Board of Revision.

By the Court,

FRANK E. READER, *P. J.*

In Court of Common Pleas of Beaver County

Agreed statement of facts

Filed June 24, 1943

To the Honorable, the Judges of said Court:

Now, June 24, 1943, the parties to the above-entitled Appeal, by their attorneys, agree upon the following statement of facts for the judgment of the Court, which agreement is for the purposes only of the trial of this appeal, to final judgment.

1. Defense Plant Corporation, Appellant herein, is a corporation created by the Reconstruction Finance Corporation, pursuant to Section 5d of the Reconstruction Finance Corporation Act of Congress, as amended.

2. The Township of Borough is a first-class township in Beaver County, Pennsylvania.

3. The County Commissioners of the County of Beaver, pursuant to the General County Assessment Law, Act of 1933, P. L. 853, Section 501, Purdon's Pa. Stat. Annot. Title 72 (5020-501), as amended, constitute the Board of Revision which hears appeals from assessments from Borough Township and other taxing districts in the County of Beaver.

4. John Howard Pew, et ux., et al., by deed dated April
13 15, 1941, and recorded in the Recorder's Office of Beaver County, Pennsylvania, in Deed Book 481, page 201, did grant and convey unto Defense Plant Corporation a corporation created by the Reconstruction Finance Corporation, pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended:

All those certain lots or pieces of land situate in the Township of Borough, County of Beaver and Commonwealth of Pennsylvania, being parts of Academy Lots Nos. 11, 12, and 13; all of Academy Lots Nos. 14 and 15, in the General Plan of Academy Lots, adjoining the Town of Beaver, and part of Outlot No. 1 in the General Plan of Outlots adjoining the Town of Beaver, lying together and together bounded and described as follows:

Beginning at a point in State Highway L. R. 278, commonly known as Route No. 930 at the intersection of the northwesterly side of Georgetown Lane with the center line of Tuscarawas Road, as originally located; thence along the extended northwesterly side of Georgetown Lane, South 54°42' West 1,731.49 feet to the center line of Walnut Lane; thence along the center line of Walnut Lane, North 35°18' West 859.28 feet to the southerly side of Division Lane; thence along the southerly side of Division Lane and lands now or formerly of Mary J. Harton, North 54°49' East 255.46 feet to a point; thence along said lands, now or formerly of Mary J. Harton, North 48°40' West 16.97 feet to a point;
14 thence by other lands of the grantors North 54°49' East 1,283.89 feet to a point in the center of the Tuscarawas Road, as originally located at line of land now or formerly of John S. Sweesy, along the center line of said Tuscarawas Road as originally located South 48°00' East, 900.92 feet to the place of beginning.

5. Defense Plant Corporation erected on said premises certain buildings, and caused the machinery specified in the assessment, hereinafter referred to, to be placed in said buildings.

6. Defense Plant Corporation leased the land, buildings, and machinery to Curtiss-Wright Corporation, a private corporation organized under the laws of the State of Delaware for the manufacture of aircraft propellers as set out in said lease, and from which private profit may be derived by the Curtiss-Wright Corporation. A copy of said lease is attached hereto, marked "Exhibit A," and made a part hereof. Said Lease Agreement has been

amended from time to time but not in any manner affecting the questions presented by this appeal.

7. In this appeal there is no dispute as to the amounts of the valuation of the property assessed for the triennial assessment for the years 1943, 1944, and 1945.

8. Later, James W. Eckler, the Assessor for Borough Township, assessed said property of Defense Plant Corporation for real property taxes for 1942, under Section 201 of the General County Assessment Act of May 22, 1933, P. L. 853, as amended (72 Purdon's Statutes 5020-201, Pocket). An itemization of the property of Defense Plant Corporation, assessed as aforesaid, is as follows:

Nine (9) Acres improved, assessed at $1,100 per acre	$9,900.00
Twenty-four (24) acres, not improved, assessed at $1,000 per acre	24,000.00
Plant building and cafeteria assessed at	338,000.00
Administration Building, assessed at	32,000.00
Boiler House, assessed at	60,000.00
Personnel Building, assessed at	5,000.00
Machinery, assessed at	388,000.00
Total	856,900.00

9. After the tax duplicate had been prepared for the 1942 taxes, and the tax statement mailed to the Defense Plant Corporation, it objected to the inclusion of the machinery, claiming machinery was personal property, and not taxable as real property. On or about the 31st day of July 1942, Curtiss-Wright Corporation paid all 1942 taxes, except upon that part of the property designated as machinery, which has not been paid.

10. At the triennial Assessment made during 1942, the Assessor for Borough Township assessed said property for real property taxes for 1943, 1944, and 1945 triennial period, at the same valuation as previously assessed, and itemized in paragraph 8, above.

11. On March 2, 1943, an appeal was made to the County Commissioners of Beaver County, sitting as a Board of Revision, by Defense Plant Corporation from the assessment made by the Borough Township Assessor, on the grounds stated therein. A copy of said appeal marked "Exhibit B," is attached hereto and made a part hereof.

(Exhibit B is printed on Page 5 as Appeal from Property Assessment.)

12. The County Commissioners of Beaver County, sitting as the Board of Revision, heard Defense Plant Corporation's Appeal on March 2, 1943, and, on March 3, 1943, dismissed the appeal as to the claims for exemption, holding all of the property to be taxable and reaffirmed the assessment made by the Borough Township Assessor.

13. That the machinery of Defense Plant Corporation in its buildings in Borough Township, Beaver County, Pennsylvania, or other machinery, are necessary and essential to its existence and operation as a manufacturing plant for aircraft propellers.

14. The Act of Congress approved June 10, 1941; c. 190 § 3, 55 Stat. 248, U. S. C. A. Title 15 § 610, provides as to Defense Plant Corporation as follows:

"Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as
17 to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, County, municipality, or local taxing authority, except as provided in section 742 (a) of Title 31. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent, according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation, (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of
18 the United States in its national-defense program, (2) the RFC Mortgage Company, the Federal National Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

15. The General County Assessment Law of May 22, 1933, P. L. 853 § 201, provides in part as follows:

"The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate:

"(a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

16. Article 9, Section 1, of the Constitution of Pennsylvania, provides in part, as follows:

"All taxes shall be uniform, upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, * * *."

17. In pursuance of the Constitutional authority, above quoted, the Legislature of Pennsylvania in the General County Assessment Law of May 22, 1933, P. L. 853, incorporated Section 204, which provides for the exemption of certain property from taxation. In subsections a, b, c, d, e, and f of said Section 204, are enumerated various classes of public property, used for public purposes, which are exempt from taxation in Pennsylvania. Subsection 204 (g), reads as follows:

"All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same."

18. At the session of General Assembly held in 1943, subsection 204 (g) as above quoted, was amended by Act No. 81, signed by the Governor May 3, 1943, so that the same at this time reads as follows:

"All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same, but this shall not be construed to include the property, otherwise taxable, which is owned or held by an agency of the government of the United States."

19. Subsection 204 (L) of the General County Assessment law of May 22, 1933, P. L. 853, reads as follows:

"All property, including buildings and the land reasonably necessary thereto, provided and maintained by public or private charity, and used exclusively for public libraries, museums, or art galleries, and not used for private or corporate profit, so long as the said public use continues. Except as otherwise pro-

ided in clause (k) of this section, all property, real or personal, ther than that which is in actual use and occupation for the urposes specified in this section, and all such property from hich any income or revenue is derived, other than from re-ipients of the bounty of the institution or charity, shall be ubject to taxation, except where exempted by law for State urposes, and nothing herein contained shall exempt same there-rom. Except as otherwise provided in clause (j) of this sec-ion, all property, real and personal, in actual use and occupa-tion for the purposes specified in this section shall be subject to taxation, unless the person or persons, asso-ciation, or corporation, so using and occupying the same, hall be seized of the legal or equitable title in the realty and ossessor of the personal property absolutely."

It is not intended that reference to any specific Acts herein hall preclude the application of any other applicable law.

Each party shall have the right to introduce relevant testimony t the hearing of this case or to object to the relevancy of any fact ereinbefore stipulated.

HAROLD F. REED,
HENRY J. CRAWFORD,
Attorneys for Defense Plant Corporation.
JOHN G. MARSHALL,
Attorney for County Commissioners of the County of Beaver, Pennsylvania.

Exhibit A to agreed statement of facts

Agreement of Lease

Curtiss-Wright Corporation (Curtiss Propeller Division—ittsburgh, Pa.)

This Agreement made and entered into this 5th day of March 941, by and between Defense Plant Corporation (hereinafter eferred to as "Defense Corporation"), a corporation created by Reconstruction Finance Corporation pursuant to Sec-tion 5d of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States hereinafter sometimes called the "Government") in its National Defense Program, and Curtiss-Wright Corporation (hereinafter alled "Lessee"), a corporation organized and doing business nder the laws of the State of Delaware; Witnesseth:

Whereas, the production of aircraft propellers for the Gov-rnment and the expansion of capacity within the United States or such production are important in the interest of the National Defense Program; and

Whereas, the War Department has advised that the establishment of an additional plant for the manufacture and furnishing of such aircraft propellers at or near Beaver, Beaver County, Pennsylvania, having a productive area of approximately three hundred sixty thousand (360,000) square feet and that the acquisition of additional machinery and equipment for use in said plant and in Lessee's existing plant (such machinery and equipment, exclusive of dies, jigs, gauges, patterns, and similar items being hereinafter sometimes called the "Machinery"), is in its opinion necessary in the interest of national defense; and

Whereas, Lessee has acquired or proposes to acquire a site at or near Beaver, Pennsylvania, consisting of approximately thirty-three (33) acres of land suitable for the location of such additional plant; and

23 Whereas, Lessee has entered into a contract or contracts with the Government for the manufacture and furnishing of aircraft propellers; and the establishment of the additional plant above referred to and the acquisition of the Machinery to be provided hereunder are essential to enable Lessee to manufacture and furnish and to expedite the delivery of such products in accordance with said contract or contracts; and

Whereas, Lessee represents that, in the price charged the Government for the manufacture and furnishing of such products there have been eliminated all charges (including amortization and depreciation), exclusive of the maintenance, taxes and insurance provided for herein, for the additional facilities to be provided for hereunder;

Now, Therefore, in consideration of the mutual covenants herein contained it is agreed by and between the parties hereto as follows:

One. Lessee agrees forthwith upon the execution of this agreement to convey or cause to be conveyed to Defense Corporation the plant site in fee simple, and Defense Corporation agrees to purchase such site. The title to the site and the price thereof shall be satisfactory to Defense Corporation.

Two. Lessee agrees forthwith and from time to time to prepare, or cause to be prepared, and to submit to Defense Corporation and to the War Department for their approval such plans, designs, specifications, and schedules for the construction

24 and equipment of the plant and the acquisition and installation of the Machinery (which shall indicate the estimated cost thereof, stating as to the Machinery the estimated price of each item), as they may require; and Lessee agrees, upon approval of such plans, designs, specifications, and schedules by Defense Corporation and the War Department, to proceed in accordance therewith and complete as soon as practicable the construction

and equipment of the plant (hereinafter called the "Construction Program") and the acquisition and installation of the Machinery (hereinafter called the "Acquisition Program"). With the approval of Defense Corporation, Lessee shall have the right to make any alteration in the plans, designs, specifications, and schedules approved pursuant to this paragraph Two; provided, that if such alteration will result in substantial delay in effecting, or a material alteration in the character of, the Programs or will increase the aggregate cost of said Programs beyond the aggregate amount of such estimates, Lessee shall likewise obtain from the War Department its approval of such alteration. Lessee agrees to furnish, without cost to Defense Corporation, all necessary dies, jigs, gauges, patterns, and similar items.

Three. In carrying out the work to be performed by it under the Construction Program Lessee may employ such contractors and enter into such contracts with them as it may deem advisable, with the written approval of a designated representative of Defense Corporation.

25 Four. Defense Corporation shall advance the funds necessary for carrying out the Construction Program, from time to time as the work progresses, upon requisition of Lessee approved by Defense Corporation. A representative of Defense Corporation authorized to approve such requisitions on its behalf shall be stationed at the site of construction during such times as Lessee may require.

Five. Lessee shall from time to time advise Defense Corporation, in writing, of the items of Machinery which Lessee shall propose to purchase for the purpose of the Acquisition Program and the estimated cost thereof, and shall forthwith proceed to purchase the same in the name and on behalf of Defense Corporation; provided, however, that no such items shall be purchased or installed if Defense Corporation shall object thereto within three (3) days of the receipt of such written advice. Defense Corporation shall, from time to time, furnish to Lessee such evidence as Lessee may request with reference to its authority to make such purchases on behalf of Defense Corporation.

Six. Lessee shall furnish to Defense Corporation and to the War Department a description of each item of Machinery so purchased so that it shall be capable of identification, and, to the extent practicable, each item shall be marked or stamped by Lessee in a way satisfactory to Defense Corporation so as to indicate Defense Corporation's ownership therein.

26 Seven. All bills of the vendors for Machinery purchased by Lessee for the account of Defense Corporation pursuant to the provisions hereof shall be promptly submitted by Lessee to Defense Corporation accompanied by a certificate of Lessee, exe-

cuted by one of its officers duly designated for that purpose, to the effect that the items covered by such bills are included in and necessary in connection with the Acquisition Program, that the prices thereof are in its opinion fair and reasonable, and that such bills are proper for payment. Such bills, and other costs of the Acquisition Program when approved by Defense Corporation, shall be promptly paid by Defense Corporation.

Eight. In the execution of the Programs Lessee agrees to comply with, and give all stipulations and representations required by, applicable federal laws and further agrees to require such compliances, representations, and stipulations with respect to any contract entered into by it with others under such Programs as may be required by applicable federal law.

Nine. No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of the site or of the Programs, except that direct expenses of Lessee's officers or employees and fees of attorneys retained or employed by Lessee in connection with the Programs may be so included to the extent approved by Defense Corporation.

27 Ten. Notwithstanding any other provisions herein contained, the amount which Defense Corporation shall be required to expend hereunder shall not exceed Five Million Two Hundred Twenty-one Thousand One Hundred Dollars ($5,221,100).

Eleven. Title to the site, buildings, and Machinery to be acquired hereunder shall, unless and until the same shall be transferred by Defense Corporation in accordance with the provisions hereof, be vested in Defense Corporation, and such Machinery shall remain personality notwithstanding the fact it may be affixed or attached to realty.

Twelve. Subject to termination upon the terms hereinafter in this paragraph Twelve provided, Defense Corporation hereby agrees to lease, and does hereby lease, the site, buildings, and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease the same from Defense Corporation for a term ending January 1, 1946, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending January 1, 1948. Defense Corporation and Lessee each agree, upon the written request of the other, to execute and deliver such additional instruments of lease as may be necessary to carry out the provisions of this agreement.

This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth. At any time when substantial use by Lessee of

the site, buildings, and Machinery shall be no longer
28 required to enable Lessee to furnish the Government with products required by it, Defense Corporation may, with the written approval of the War Department, give written notice to Lessee that such substantial use is no longer required and that Defense Corporation therefore proposes the termination of the lease or extension thereof, and Lessee may give similar written notice to Defense Corporation and to the War Department stating that Lessee therefore proposes the termination of this lease or extension thereof. The lease, or extension thereof, shall terminate five (5) days after receipt by Lessee of the notice from Defense Corporation above provided or after receipt by Defense Corporation and the War Department of the notice from Lessee above provided, unless within that time Lessee or the War Department, as the case may be, shall require by notice in writing or by telegraph to the other and to Defense Corporation, that the facts necessary to termination, as hereinabove provided, be submitted for determination by arbitrators, in which event the arbitrator to be appointed by the party giving the notice of arbitration shall be named in the notice, the arbitrator to be appointed by the other party to the arbitration (Lessee or the War Department, as the case may be) shall be named within five (5) days of receipt of such notice of arbitration, and an additional arbitrator shall, within five (5) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but
if one of said parties shall have failed to appoint an arbi-
29 trator, the sole arbitrator shall arbitrate the question alone. If two (2) arbitrators shall have been appointed by the respective parties to the arbitration and shall have failed to select an additional arbitrator within the above-stated time, the additional arbitrator shall be appointed by the Senior Judge of the Circuit Court of Appeals for the Third Circuit, upon application therefor by either of said parties to the arbitration. The decision of a majority of the arbitrators so appointed, or if either party shall have failed to appoint its arbitrator, the decision of the sole arbitrator, shall be final and binding upon the Lessee, the War Department and Defense Corporation for all purposes. The cost of arbitration, except the cost of the arbitrator appointed by the War Department, shall be paid by Lessee. The arbitrators, or the sole arbitrator, as the case may be, shall give prompt notice in writing of the decision to the War Department, to Lessee and to Defense Corporation, and if the decision establishes that the facts necessary to termination exist, this lease, or extension thereof, shall terminate on the fifth day after the giving of notice of the decision.

Thirteen. In consideration of the covenants herein contained and as rental for such site, buildings, and Machinery, Lessee

agrees to pay to Defense Corporation for the period of this lease, or extension thereof, the sum of One Dollar ($1) per year payable on or before the first day of January of each year.

Fourteen. Defense Corporation, by notice in writing with the approval of the War Department noted thereon, may, in addition to all other rights with reference to termination under paragraph Twelve hereof, cancel this lease, or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the manufacture or furnishing of aircraft propellers or other products shall be terminated or canceled prior to completion, or (b) the Government shall request priority with respect to the manufacture or furnishing of any products with the facilities to be provided hereunder, and Lessee shall fail or refuse to give such priority, or (c) Lessee is adjudged insolvent or bankrupt, a receiver is appointed for Lessee or its property, Lessee makes an assignment for the benefit of creditors, or a petition is signed by Lessee pursuant to any of the provisions of the United States Bankruptcy Act, as amended, or a petition under any of the provisions of the United States Bankruptcy Act, as amended, is filed against Lessee and such petition is not dismissed within sixty (60) days, or (d) of any violation of any of the terms, conditions or covenants of this lease or extension thereof by Lessee and the failure of Lessee to cure such violation within thirty (30) days from the giving of written notice thereof by Defense Corporation to Lessee. Upon the expiration, termination, or cancellation of this lease or extension thereof, Defense Corporation shall have the right to invoke any remedy permitted by law or in equity for the protection of its interests hereunder and Lessee hereby expressly waives all rights which it may have to redeem or to be served with any further notice of Defense Corporation's intention to cancel or terminate this lease or extension thereof other than as herein provided.

Fifteen. Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph Fourteen (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said clause (a)) Lessee shall have and is hereby granted, for a period of ninety (90) days after such termination, expiration, or cancellation (hereinafter referred to as the "Option Period") the right and option by written notice to Defense Corporation and to the War Department, to purchase all but not part of the site, buildings, and Machinery at the following prices:

(a) If exercised within eight (8) months from the date of

execution hereof, at the actual cost to Defense Corporation of the site, buildings, and Machinery (including all direct expenses without overhead incurred by Defense Corporation in connection therewith or in connection with this agreement); or

(b) If exercised after eight (8) months from the date of execution hereof, at the actual cost to Defense Corporation of the
32 site, buildings, and Machinery (including all direct expenses without overhead incurred by Defense Corporation in connection therewith or in connection with this agreement), less an amount representing depreciation, obsolescence, and loss of value due to use for national defense purposes for each year or fractional part thereof at the following rates for the following classifications of equipment, which classifications shall be determined in connection with the various items as the construction and acquisition of the items comprising the Programs proceed:

1. Buildings, Improvements (fencing, paving, spur tracks, etc.) and Building Installations other than mechanical, 5%.

2. Installations (mechanical), Equipment, Machinery, Shop Fixtures, Laboratory and Test Equipment; Furniture and Fixtures, Trucks, etc., 12%.

3. Portable Durable Tools and Automotive Equipment, 50%.

Provided, however, that the minimum residual value on all items shall be 15%.

During the Option Period Lessee shall have the right to negotiate with Defense Corporation and the War Department for the purchase or lease of the site, buildings, and Machinery, or any portion thereof, and, upon the establishment by the Lessee, Defense Corporation, and the War Department of mutually
33 satisfactory terms and conditions, Defense Corporation will sell or lease, as the case may be, the property covered thereby to Lessee. Defense Corporation further agrees, to the extent that it lawfully may, that it will not sell the site, buildings, and Machinery or any part thereof to any party or parties other than another branch of the Government (in which event such sale shall be in all respects subject to paragraph Twenty-six hereof) for a period of ninety (90) days following the expiration of the full Option Period unless it shall first have offered the same for sale to Lessee at a price equal to the best offer received by Defense Corporation and Lessee shall have failed or refused to purchase the same within thirty (30) days after the receipt of such offer. In the event of any sale to Lessee pursuant to the provisions of this paragraph, transfer of title shall be made without any representations or warranties whatsoever on the part of Defense Corporation.

Sixteen. So long as the lease remains in full force and effect Lessee shall procure and maintain at its cost insurance on the

buildings and on the Machinery to be acquired hereunder against fire, windstorm, and such other hazards, in such companies, and in such amounts as shall be satisfactory to, or required by Defense Corporation. The policies evidencing such insurance shall be made payable to, and delivered to, Defense Corporation. In the event of loss under any of the policies, the proceeds may, upon the written request of Lessee promptly made, be used by Lessee for the repair, restoration, or
34 replacement of the property damaged or destroyed, and to that end Defense Corporation shall promptly make available to Lessee the insurance proceeds received by Defense Corporation. Any property acquired in replacement shall be the property of Defense Corporation and so identified and shall be subject to all the terms and provisions of this agreement.

Seventeen. Lessee agrees to save Defense Corporation harmless against any liability whatsoever because of accidents or injury to persons or property occurring in the operation of the plant or the use of the Machinery by Lessee. Lessee also agrees that during the term of this lease or any extension thereof, it will procure and maintain at its cost public liability insurance and property damage insurance in such amounts and with such companies as Defense Corporation shall approve or require. The policies evidencing such insurance shall name Defense Corporation as an assured and shall be delivered to Defense Corporation.

Eighteen. Lessee shall use reasonable care in the use and operation of the site, buildings, and the Machinery to be provided hereunder and shall keep the same in good state of repair (ordinary wear and tear excepted), and upon the expiration, termination, or cancellation of this lease or extension thereof, and upon expiration of the Option period, if any, Lessee shall forthwith yield, and place Defense Corporation in peaceful possession of the site and buildings and of all the Machinery to be
35 provided hereunder free and clear of any liens and claims other than those resulting from claims against Defense Corporation; and if any of the Machinery shall be then located elsewhere than in the additional plant to be provided hereunder, Defense Corporation shall, in addition, have the right to remove, and upon the written request of Lessee, shall promptly remove, at its own expense, such Machinery, and if such removal shall not take place within sixty (60) days after such request, Lessee may remove the Machinery and place it in storage for the account and at the expense of Defense Corporation, and Defense Corporation shall have corresponding rights and Lessee shall have corresponding rights and obligations with respect to removal and storage of such machinery not owned by Defense

Corporation as may then be located in the additional plant to be provided hereunder.

Nineteen. Lessee may use such items of Machinery as it may designate in writing to Defense Corporation, in connection with the manufacture and furnishing of aircraft propellers and other products for the Government in any other plants of Lessee. Lessee may also, with the written approval of Defense Corporation and the War Department, lease or lend to any suppliers any item of Machinery, the lease or loan of which it may deem necessary for the performance by Lessee of its contracts with the Government. Any such lease or loan shall be upon such terms and conditions as Defense Corporation and the War De-
36 partment may approve, and Lessee shall in no event by any such lease or loan be relieved of its obligations under the provisions of this agreement.

Twenty. Lessee agrees to pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which at any time during the term of this lease or any extension thereof may be taxed, assessed, or imposed upon Defense Corporation or Lessee with respect to or upon the site, the buildings, or the Machinery, or any part thereof, or upon the occupier thereof or upon the use of the site, buildings or Machinery. Lessee also agrees to pay all claims or charges for or on account of water, light, heat, power, and any other service or utility furnished to or with respect to the site, the buildings, or the Machinery, or any part thereof.

Twenty-one. In carrying out the Programs and in the operation of the plant and any of the Machinery to be acquired hereunder Lessee agrees to comply with all applicable State, municipal, and local laws and the rules, orders, regulations, and requirements of any departments and bureaus and all local ordinances and regulations and further agrees to indemnify and hold Defense Corporation harmless from any liability or penalty which may be imposed by local or State authority or any department or bureau thereof by reason of any asserted violation by Lessee or such laws, rules, orders, ordinances, or regulations.

37 Twenty-two. Lessee agrees that it will not, without the prior written consent of Defense Corporation and the War Department, use such site, buildings, and Machinery for any purpose except for the manufacture and furnishing of aircraft propellers and other products for the Government unless Lessee shall make available for such manufacture and furnishing other facilities of substantially equivalent productive capacity. Lessee also agrees that as long as this lease or extension thereof remains in effect it will eliminate all charges (including all charges for amortization and depreciation) exclusive of the maintenance,

taxes and insurance provided for herein, for the site, buildings, and the Machinery to be provided hereunder, or, as the case may be, for any such substantially equivalent productive capacity, from any price charged the Government or any supplier for the Government.

Twenty-three. So long as this lease or any extension thereof remains in effect, Lessee shall make available to Defense Corporation and the War Department for audit and inspection, its records pertaining to the acquisition of the site and the Programs and the operations of the plant and any of the Machinery. Defense Corporation and the War Department shall have the right to inspect the site, buildings and Machinery to be provided hereunder at all reasonable times during the continuance of this lease or extension thereof.

38 Twenty-four. Lessee will not without prior written consent of Defense Corporation and the approval of the War Department, sell, assign or pledge this lease or any of its rights or obligations hereunder or sublease or permit the use by others of any of the property covered by this lease, except to the extent permitted by paragraph Nineteen hereof.

Twenty-five. The failure of Defense Corporation to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this agreement shall not be construed as a waiver or a relinquishment of the future performance of any such term, covenant, or condition, but Lessee's obligation with respect to such future performance shall continue in full force and effect.

Twenty-six. It is contemplated that the site, buildings, and Machinery to be provided hereunder by this agreement may be transferred and conveyed to another branch of the Government, and, upon such transfer, the Government, acting through the War Department, shall succeed to all the rights, powers, privileges, discretion and obligations of Defense Corporation hereunder, retaining, however, all discretion and power of approval herein vested in the War Department. In the event of such transfer, Defense Corporation shall cease to have any rights, duties or obligations hereunder and all powers in Defense Corporation to give any notices, consents or approvals or to raise any objections and the right of Defense Corporation to receive any notices provided for herein shall terminate and thereafter shall be vested in the War Department.

39 Twenty-seven. No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement or to any benefit arising therefrom.

Twenty-eight. Whenever used herein, the term "War Department" shall mean the Secretary of War or any assistant head of the War Department or the Chief of the Material Division, Air Corps, or any person authorized by or acting on behalf of any of the foregoing.

Executed as of the day hereinabove first written.

DEFENSE PLANT CORPORATION [SEAL]
By JOHN W. SNYDER,
Vice President.

Attest:
A. T. HOBSON, *Secretary.*

CURTISS-WRIGHT CORPORATION [SEAL]
By ROBERT L. EARLE,
Vice President.

Attest:
P. H. SCHNECK, *Assistant Secretary.*

CITY OF WASHINGTON,
District of Columbia, ss:

On this 7th day of March A. D. 1941, before me, a Notary Public in and for the District of Columbia, appeared John W. Snyder and A. T. Hobson, to me personally known, who being by me sworn, did each for himself say that they are respectively the Vice President and the Secretary of Defense Plant Corporation, the corporation named in and which executed the within instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said John W. Snyder and A. T. Hobson acknowledged said instrument to be the free act and deed of said corporation.

RONALD M. ALLEN,
Notary Public, District of Columbia.

My commission expires Sept. 30, 1943.

STATE OF NEW JERSEY,
County of Orange, ss:

On this 5th day of March A. D. 1941, before me a Notary Public in and for the County of Orange, appeared Robert L. Earle and P. H. Schneck, to me personally known, who being by me sworn, did each for himself say that they are respectively the Vice President and the Assistant Secretary of Curtiss-Wright Corporation, the corporation named in and which executed the within instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument

was signed and sealed in behalf of said corporation by authority of its board of directors, and said Robert L. Earle and P. H. Schneck acknowledged said instrument to be the free act and deed of said corporation.

[SEAL] FREDERICK A. WOLTZ,
Notary Public—New Jersey.

My comm. expires Aug. 26, 1943.

41 In Court of Common Pleas of Beaver County

Statement of evidence

Record of testimony taken and proceedings had upon the hearing of the above-entitled cause

Before Honorable FRANK E. READER, P. J.

At the Court House, Beaver, Pennsylvania

Beginning on Wednesday, June 24th, A. D. 1943, at one-thirty o'clock P. M.

Appearances

Messrs. Reed & Ewing, by Harold F. Reed, Esq., and Messrs. Squire, Sanders & Dempsey, by Henry J. Crawford, Esq., of Counsel, appearing on behalf of Appellant; John G. Marshall, Esq., County Solicitor, appearing on behalf of Appellee.

PROCEEDINGS

MR. REED. If the Court please, I move the admission of Henry J. Crawford, Esq., who is a member of the Court of Last Resort of the State of Ohio, for the purpose of this case.

THE COURT. Very well.

42 MR. MARSHALL. Don't take this; this is off the record.

(Discussion here ensued which was not reported.)

Offers of counsel

MR. MARSHALL. We offer in evidence the Agreed Statement of Facts, signed by counsel for the parties, and it is stipulated that it be made a part of the record. Unless the Court desires me to read it, I will not read it at this time, and it may be copied into the record by the stenographer.

THE COURT. It may be copied into the record by the stenographer; you need not read it now.

[Agreed Statement of Facts is printed at page 12a and Agreement of Lease dated March 5th, 1941, is printed at page 21a of Record.]

* * * * *

Mr. MARSHALL. We offer in evidence the deed from John Howard Pew and Helen P. Pew, his wife, Joseph Newton Pew—maybe, I can simplify this by offering the record.

Mr. REED. That is all in the agreed statement of facts, in Section 4.

The COURT. Yes; in paragraph four that deed is recited, and the property, apparently, is described. Of course, we don't know how complete that is, but, we think that will cover it.

43 Mr. MARSHALL. Do you think that will be sufficient?

The COURT. Yes.

Mr. MARSHALL. If the Court please, we want to offer in evidence the assessment, from the official County assessment records, showing the assessment in Borough Township, Beaver County, Pennsylvania, of the Defense Plant Corporation—

Mr. REED. That is all in the agreed statement of facts, in paragraph eight, nine, and ten, in detail.

Mr. MARSHALL. We have agreed to that.

Mr. REED. We have agreed to the official record as it is set out in paragraph eight.

The COURT. If you wish to offer it formally, you may do so, with the understanding that it will be copied into the record just the once.

Mr. MARSHAL. We will offer the assessment as it appears in the official records of the office of the County Commissioners, as set forth in the agreed statement of facts.

Mr. Frauenheim, be sworn.

44 H. T. FRAUENHEIM, called as a witness on behalf of Appellee, having been first duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. What is your full name?

A. H. T. Frauenheim.

Mr. MARSHALL. In the agreed statement of facts it is agreed that we each have the right to offer any additional testimony on any matter which we think important, and the matter which Mr. Frauenheim is to testify to is not contained in the agreed statement of facts. There may be a question as to its relevancy, but it may be advisable to give the Court the information.

By Mr. MARSHALL:

Q. Where do you live?

A. 7322 Trevanion Avenue, Swissvale, Pa.

Q. What is your business, at present?

A. I am Special Machinery Appraiser for Allegheny County.

Q. How long have you been so engaged?

A. Seven years.

Q. What was your business prior to that time?

A. I was in the manufacturing business, in the manufacture of enamel iron wire, locomotive stay bolts, forgings, and machine tools.

45 Q. While you were engaged in the manufacturing business did you have anything to do with the installation of machinery in mills and industries?

A. Yes; we manufactured a jarring molding machine, which we placed in foundries from one end of the country to the other, and which required special foundations, and, I would add, also, the general installation of machine tools, in our own shops, machine shops, forging shop, and enamel plant.

Q. During the past seven years, have you had opportunity to observe the manner in which machinery is or has been installed in various plants?

A. Yes, sir.

Q. Have you had an opportunity to observe the machinery in the Defense Plant Corporation, in Borough Township, Beaver County?

A. Yes, sir.

Q. Did you observe its manner of installation?

A. Yes, sir.

Q. When did you see this machinery?

A. On June 23rd, 1943.

Q. Did you make a list of the machinery, as you went through this plant?

A. Yes, sir.

Mr. MARSHALL. Mark this as an Exhibit. (List of machinery and equipment marked "Appellee, Beaver County, Exhibit No. 1, for identification.")

By Mr. MARSHALL:

Q. I show you Beaver County Exhibit No. 1, and ask you to state what that is?

46 Mr. REED. Mr. Frauenheim testified that there was a list that he made yesterday; is that it?

A. Yes, sir.

Mr. MARSHALL. Read the question.

(Question read by stenographer.)

A. That is a list of the machine tools located in the Defense Plant Corporation, Curtiss-Wright Corporation Propeller Division, lessees, Borough Township, Beaver County.

Q. Mr. Frauenheim, just describe to the Court how that machinery is installed in this plant?

A. Well, to break it down, if we go into the boiler room, we have two five hundred——

Mr. REED. Just a minute; before we go into that, hadn't we better do something to tie this in with the assessment? I think that we should agree, at this point, that what Mr. Frauenheim has listed is the same general type of machinery was assessed by the Assessor.

Mr. MARSHALL. We understood this would——

Mr. REED. This is a list of machinery, which I understood him to say was made on June 23rd, and there may have been some changes between the time Mr. Eckler assessed it and the present time. I think we can put in testimony later, to show just what has been added, if the Court is interested.

47 Mr. MARSHALL. I don't think that statement is correct, "the same general type"; this machinery is the same, all the way through.

Mr. REED. That is undoubtedly correct.

Mr. MARSHALL. I don't want anything in the record to show that the machinery he saw is not the machinery that was assessed.

Mr. REED. Could we state it this way: That the machinery which Mr. Frauenheim has listed as being in the Curtiss-Wright plant yesterday was, in some instances, the identical machinery that was there at the time of the assessment by Mr. Eckler, but there may have been some additions or changes in the interim, with the exception of the furnaces and the boilerhouse; we will have to introduce testimony to show that that has been put in since. Is that correct, Mr. Frauenheim?

A. I don't know; I didn't inquire when that was put in; I assumed that, if the plant was in operation prior to December 1942, the boilerhouse would be there.

Mr. REED. Don't take this.

(Discussion here ensued, which was not reported.)

48 The COURT. Might we not allow Mr. Frauenheim to testify as to what he found there, which will appear in this exhibit? Then, when you gentlemen have examined that exhibit, if you wish to question any of it having been there at the time of the assessment, or having been embraced in the assessment, you might do that; it might be easier for you to do that, after you have checked his list. We would receive it, subject to any correction.

Mr. MARSHALL. Your Honor, it was just a few weeks ago that this assessment was actually made, and I think we are justified in assuming that the machinery in there now was in there at the time the assessment was made.

Mr. REED. Can we say that the machinery, as included in this list, was the machinery assessed by Mr. Eckler, the Assessor, except, as the witnesses for the Defense Plant Corporation may testify, what may have been added or changed since?

Mr. MARSHALL. That is all right. Read the question and answer.

(Question and answer read by stenographer.)

A. Two five hundred horsepower boilers, installed by the Combustion Engineering Company; these boilers were resting on concrete and brick foundations and the boilers are en-
49 closed by brick walls. In the same building, we have four air compressors, driven by individual motors, ranging from one hundred and seventy-five horsepower to one hundred horsepower, and these air compressors are resting on individual concrete foundations, and bolted thereto.

By Mr. MARSHALL:

Q. How are they bolted down; just describe that?

A. There are lag bolts that are put through the foundation, with a square head on the one end, and the other end is threaded, so as to apply a bolt—or a nut, correct that; to apply a nut to the threaded end, and, then, that is turned to a tight position, and four such bolts make a firm contact with the base of the machine, to the foundation.

Q. I understand, then, there are four bolts, which are imbedded in the case; cement base?

A. That is right.

Q. So placed that, when they set the machinery there, those bolts will protrude through the base of the machine?

A. That is right.

Q. Then, the nuts are put on top of them and screwed down tightly?

A. That is right.

Q. Must those bolts be placed at particular spaces, in the foundation, in order to fit the hole in the base of the machine?

A. That is right; yes, sir.

Q. Suppose you removed one of these machines, that had
50 been so placed, and replaced it with another, different sized machine, what would have to be done, if anything?

A. If it was a similar type of machine, they could take the machine off that foundation and replace it with another one. If it is a different sized machine, they would have to reproduce the entire

foundation, including the bolts; the same arrangement that was there previously, with the old machine.

Q. What other construction do you want to speak of?

A. We have two five-inch upsetters, forging machines, of very heavy weight; I don't know the exact weight; and, those machines are placed upon a specially built foundation, in a similar manner as described with the air compressors, with the bolts, fastened down to the foundation. Then, there was two induction type furnaces that were, also, resting on individual foundations, and made a part of the foundations.

Q. How do you mean, "made a part of"; describe that?

A. Well; those furnaces—the foundations are built there and the induction type furnaces are resting upon the concrete foundation; I wasn't able to see down exactly whether or not the cement part of the foundation was built around the machine or whether the machine had a base and was bolted on.

Q. It rests on a cement base?

A. Yes.

Q. I believe that machine protrudes down below the level of the floor?

51 A. Yes.

Q. The base of it?

A. Yes.

Mr. REED. You don't mean the base of the machine.

Q. The level of the first floor——

A. The furnaces and the rest of the equipment is resting on individual bolted foundations, to this extent, that I understand the floor of this building, which is about six hundred feet by six hundred feet, has a reinforced concrete slab, seven inches thick, and, upon that concrete slab there was placed a two inch block. The other types of machines, individually, are connected to the concrete block, in the same manner, with bolts, imbedded in the concrete, which then come up through and attach, with nuts, to the individual machines, so that each individual machine is firmly attached to this seven inch concrete slab. I think that covers practically the installation of the majority of the machines. In addition to that, there was some movable items.

Q. Just a minute, Mr. Frauenheim; did you observe the installation of the electrical equipment, in connection with those machines that were electrically driven?

A. Practically all of the machines, I would say, practically all of the machines are direct drive; that is, they have their motors directly attached to the machines, and, then the current is brought to the machine; I haven't got a plan of how they distributed the current, but I imagine it is through conduits.

52 Q. How is it brought to each machine, if you know: is it brought above or through the floor, or underneath, or how?

A. I think it is brought underneath; I think they have their conduits underneath the floor, but I didn't notice particularly; I believe the Company could describe that a little better than I can, but the conduits and electrical attachments are made to each machine.

Q. Now, in connection with these machines and the installation, as you have described it, if one of these machines was being replaced by another machine, it would have to be an identical machine, as to size at least, in order to fit on to the base; is that correct?

A. Yes; practically so.

Q. But, to replace one of these machines with a machine of a different type or different size, I suppose the bolts and nuts protruding from the cement would not fit the new one, unless they were replaced, at least?

A. That is right; they would have to change it, in order to suit the other condition.

Q. Now, in this type of construction, which you have spoken of, is that the ordinary and customary manner of installing similar machinery in a plant?

A. Yes.

Q. Was there any other machinery there, that you saw, that was movable?

53 A. Yes; there was five five-ton electric Yale trucks, that they used for transferring their manufactured article from one division to another.

Q. They are portable, I suppose?

A. Yes.

Q. And travel about on their own power?

A. Yes; electric power.

Q. And they are used in connection with the plant?

A. Yes, sir.

Q. This Beaver County Exhibit No. 1, is that a list of the machinery that you observed, that you looked at, when you were in the plant?

A. Yes, sir.

Q. That list of machinery is in the Curtiss-Wright plant, in Borough Township?

A. Yes.

Mr. MARSHALL. We offer Beaver County Exhibit No. 1 in evidence.

Mr. REED. We are not objecting to that; the only thing I do want to state, in connection with the offer is, does this relate back to the previous statement on the record, with respect to our

right to introduce testimony to show whatever changes might have been made since the first of the year?

The COURT. Oh, yes; this would be subject to any testimony that may be offered to contradict it. The exhibit is admitted.

(Beaver County Exhibit No. 1 for identification, received in evidence.)

Mr. MARSHALL. Cross-examine.

Cross-examination by Mr. REED:

Q. Mr. Frauenheim, I understand that your trip there yesterday, or the day before, was your first trip through this plant?

A. Yes.

Q. So that, you, personally, would not be familiar with the machinery that would be in there on, say, December 31st, 1942?

A. No, sir.

Mr. REED. That is all.

Mr. MARSHALL. That is all.

(Witness excused.)

Mr. MARSHALL. The County rests.

(Whereupon, the appellee rested its case.)

55 APPELLANT'S EVIDENCE

J. E. WHITE, called as a witness on behalf of Appellant, having been first duly sworn, testified as follows:

Direct examination by Mr. REED:

Q. What is your full name?

A. J. E. White.

Q. By whom are you employed, Mr. White?

A. Curtiss-Wright Corporation, Propeller Division.

Q. In what capacity?

A. My official title is Chief of Defense Plants Department.

Q. Will you just explain what that is?

A. At the initiation of the—prior to the establishment of the National Emergency, the provision for emergency facilities was instituted by the United States Government, through its armed services; my particular department was assigned the responsibility for handling all of those facilities, in the nature of a coordinator.

Q. How long have you been acting in that capacity?

A. Since May 12th, 1941.

Q. Were you acting in that capacity, at the time of the installation of the machinery by Defense Plant Corporation in this plant in Borough Township?

A. I was.

56 Q. Are you familiar with the machinery that was there installed?

A. To a general extent; yes.

Q. What do you mean by "to a general extent"?

A. I don't have available, in my own memory, a detailed list of the machinery.

Q. No; were you familiar at the time, not now; I don't ask you to recall it all now, but were you familiar at the time of the installation of this machinery in the Defense Plant Corporation, at the time it was being originally equipped?

A. Oh, yes.

Q. Was that part of your duty?

A. The actual installation of the machinery was in charge of our Chief Construction Engineer.

Q. Who was that?

A. Mr. J. A. Bender.

Q. Mr. Bender is in Court here, is he?

A. He is.

Q. Were you and Mr. Bender present here frequently or most of the time when this machinery and equipment were installed there in this plant?

A. Mr. Bender actually resided in this area during the construction and installation of the building. I made frequent trips, myself, to this particular plant.

Q. Were you familiar with the type of machinery and equipment that were placed in the plant?

A. I was.

57 Q. Do you know where the machinery was procured?

A. Yes.

Q. Were you familiar with the manner in which the machinery was placed in the plant, that is, the type of the annexation or manner in which it was set or placed?

A. That is a physical detail that Mr. Bender is more familiar with than I am.

Q. Mr. White, I believe that, prior to the operation of this plant in Borough Township, there was a plant being operated on Neville Island, near Pittsburgh, in Allegheny County, is that correct, for the construction of airplane propellers?

A. Curtiss-Wright operated a plant at Neville Island.

Q. Was the machinery in that plant used in the equipment of this plant at Borough Township?

A. Yes.

Q. The same, identical machinery?

A. Certain machines were actually physically transported from the old plant to the new plant.

Q. What type of machines?

A. Lathes, milling machines, presses, furnaces, air compressors.

Q. Was the Neville Island operation operated under a lease by Curtiss-Wright?

A. The building, in which we manufactured propeller blades, was leased from the Pittsburgh Screw and Bolt Company.

58 Q. Were you familiar with the manner in which the machinery in that plant was affixed to the floor of the plant?

A. I was.

Q. Was the character of the annexation similar to the character of the annexation of the identical machines, later, in the Curtiss-Wright plant in Borough Township?

A. Yes.

Mr. REED. If the Court please, Mr. Bender was the actual engineer in charge. I would like to ask Mr. White to step aside and put Mr. Bender on. Go ahead and cross-examine.

Mr. MARSHALL. Are you through with him?

Mr. REED. No.

Mr. MARSHALL. We will cross-examine later.

(Witness temporarily excused.)

J. A. BENDER, called as a witness on behalf of Appellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. REED:

Q. What is your full name?

A. J. A. Bender.

Q. By whom are you employed, Mr. Bender?

59 A. Curtiss-Wright Corporation, Propeller Division.

Q. What is your position?

A. I am officially known as Chief Construction and Plant Engineer, for the division.

Q. Were you connected with the Curtiss-Wright Company, at the time of the construction of the Defense Plant Corporation, in Borough Township?

A. Yes; I was.

Q. In what capacity were you working there?

A. My official title, at that time, was Plant Engineer of the Beaver plant, and I was responsible for the design of the plant, its construction, the installation of all machinery and equipment; the design and purchase of miscellaneous equipment.

Q. Did you devote your full time, then, to the construction and equipment of this plant in Borough Township?

A. No; I devoted six days a week to it, and one day to a plant in Indianapolis.

Q. Well, was the construction of this plant, and the installation of the mechinery, done under your direction and control?

A. Yes.

Q. Were you familiar with all of the machinery that was installed in the plant?

A. Yes.

Q. Prior to that time had you been familiar with the machinery that was installed in the Neville Island plant?

60 A. Yes.

Q. Of Curtiss-Wright?

A. Yes.

Q. Was some of the machinery in the Neville Island plant transported and installed in the Borough Township plant?

A. All the machinery at the Neville Island plant was installed in the Borough Township plant, except one piece of equipment, which we sold.

Q. It was sold?

A. Yes.

Q. Could you enumerate the equipment, generally, that was taken out of the Neville Island plant and installed in the Borough Township plant?

A. Yes; we moved X-ray machines; large milling machines, with tables up to fifty-six inches in length; we moved the upsetting machines that Mr. Frauenheim mentioned; air compressors; hydraulic presses, ranging in size up to two thousand tons; we moved miscellaneous rigs and benches; turret lathes; demagnetizers.

Q. Were the air compressors which were moved the same, concerning which Mr. Frauenheim testified?

A. Yes, two of the air compressors now installed in the boiler house, in the Beaver Plant, were moved from Neville Island.

Q. Did the Neville Island plant devote its activities to the manufacture of airplane propellers?

A. No, the Neville Island plant was devoted to the same
61 manufacture as the Borough Township plant is now, that is hollow blades for airplane propellers.

Q. Then, the Borough Township plant now manufactures the same product, exactly, as the Neville Island plant did?

A. Exactly.

Q. Was there any damage to the Neville Island plant by reason of the removing of this machinery?

Mr. MARSHALL. We object to that, your Honor, it has nothing to do with this assessment.

The COURT. What is the purpose of this inquiry, Mr. Reed?

Mr. REED. The purpose of this is that while we are involved with a Pennsylvania problem here, we are also involved with a Federal problem, and the question as to the damage which might ensue from the removal of the machinery might prove material—

Mr. MARSHALL. We will withdraw our objection.

The COURT. You propose to show that they were removed without damage to the building as constructed; itself?

Mr. REED. Yes.

The COURT. Very well.

62 A. What was the question?

Mr. REED. Read the question.

(Question read by stenographer, as follows:

"Q. Was there any damage to the Neville Island plant by reason of the removing of this machinery?")

By Mr. REED:

Q. Let me restate that, this way: Was there any damage upon the building or freehold of the Neville Island plant, by reason of the removal of this machinery that you have testified to?

A. No, there wasn't.

Q. Will you please explain the manner in which the equipment in the Borough Township plant is annexed or fixed in place?

A. Most of the equipment is placed on the wood block floor.

Q. Just explain to the Court what this wood block floor is?

A. That is a two-inch layer of wood, cut corewise, to form a wearing surface over the concrete, so that the concrete will not chip off or crack, due to the dropping of steel bolts and plates.

Q. Are these wood block removable or not?

A. Yes.

Q. Is there any damage done to the wood block by removing them?

63 A. Any wood block can be replaced, if some care is exercised.

Q. Proceed, then.

A. The largest portion of the machinery is merely placed on the floor; occasionally, it is necessary to provide lag bolts and expansion shields, in the concrete, in order to keep the machinery from shifting sideways, due to vibration, and thereby get out of alignment. We have some equipment, for which, due to the nature and its bulk, we are forced to provide extra foundations; such machines would include the upsetting machines, or the hydraulic presses; air compressors; the induction furnaces, which were mentioned by Mr. Frauenheim, do not sit on foundations; they merely sit on the concrete floor, from which the wood block has been removed. As a matter of fact, we shipped one of those machines yesterday, on half an hour's notice, to our New Jersey plant, and, I think, by five o'clock today, it will be running down there.

Q. Do you move this machinery frequently?

A. Yes; in the last eighteen months, we have probably rearranged ninety percent of the machinery that is now installed in the Borough Township plant.

Q. Was any damage done to the building or freehold by reason of the removal, or movement from place to place, of that machinery?

A. No damage of any consequence; merely a matter of patching the wood block floor, replacing the blocks and, perhaps, applying some tar.

64 Q. How frequently would you say that some machinery is moved, in the Borough Township plant?

Mr. MARSHALL. What is that last question?

Mr. REED. Read the question.

(Question read by stenographer.)

A. Some machines might be moved every three or four months; others might sit in one position for two years, depending upon the changes in production.

Q. By reason of change of design or improvements in such designs, are there frequent changes in the machines themselves?

A. Yes. The major problem is obsolescence.

Q. And, from the time that that plant began operations, to the present time, what proportion of that machinery and equipment, would you say, had been replaced by a newer or later type?

A. We have replaced approximately forty percent of the original equipment.

Q. What effect upon the freehold or building, with respect to damage, have these removals of the forty percent caused?

A. None whatsoever.

Q. Now, would you go ahead and tell us more about this annexation; you spoke about the upsetters; how are the upsetters attached?

A. The upsetters are supported by the concrete foundations, but the upsetters are bolted to the foundations.

65 Q. With the exception of the upsetters, what would you say with respect to all of the other machinery in the plant having been moved, from the time of its original installation?

A. Do you mean how many of the machines have been removed or what percentage of them have been removed?

Q. Yes; with the exception of the upsetters?

A. Perhaps seventy per cent of the remainder have been moved and, within the next three months, I believe that some seventy per cent will be moved again, plus twenty per cent more.

Q. What is the occasion for that?

A. We find it necessary to streamline our production lines about once a year, in order to keep up with changes and developments concerning the operation of manufacturing the hollow propeller blade.

Q. And is the manner of attachment of the machinery to the floor done with that in view?

A. Yes; all of the installations are designed with a view towards flexibility; the electrical connections to the machines are merely made by a plug into the "bus" duct above the machine.

Q. Are the electrical lines carried overhead?

A. All of them; we may move a machine forty feet away, and change the electric line just by a plug-in.

Q. They are not carried by a conduit under the floor?

A. No.

66 Q. Mr. Frauenheim has testified with respect to two induction type furnaces; will you please explain the character of that annexation?

A. Well, perhaps I had better explain that an induction furnace, such as that which Mr. Frauenheim has reference to, is nothing more than a high-frequency motor-generator set, using ultra high frequencies, which induce a secondary current on a bar placed in the magnetic field, thereby creating heat. In other words, in furnace of this type, you create high temperature in a piece of steel five inches in diameter and twelve inches long. The machine weighs in the neighborhood of two and a half tons; it is relatively light, and it is bolted into a cast steel frame, carrying a motor generator set, the starting equipment, a cooling fuse, and the induction coils themselves. That entire machine comes in one piece. At the Borough Township plant, we removed the wood blocks above the concrete floor, and rested the steel frame of the machine directly on the concrete floor; that is all that is required to place the machine.

Q. It is not set into a concrete base?

A. No; it isn't.

Q. And does the weight of the machine hold it in position?

A. Yes; in addition to that, the gyroscopic effect of the high-speed motor-generator set will also hold it in position.

Q. Does any machinery or equipment in that building support the building?

67 A. I don't know of any case where that would be true.

Q. In any case that you think of, does the building support the machinery?

A. Only the——

Q. I mean, of course, other than if you call the floor the building; I assume that; I didn't mean to put you out on a limb, like that, Mr. Bender?

A. No; the only place where the building supports equipment, off the floor, would be in the case of hoists, the monorail, or crane runway, but I don't consider that machinery; there are no machine tools, presses, compressors, or manufacturing equipment supported by the building.

Q. In addition to this plant here—withdraw that. I believe, under the contract with Defense Plant Corporation, which is in evidence in this case, that the right to interchange or to move machinery from one plant to another plant is specifically permitted?

A. That is correct.

Q. Is that frequently done?

A. Very, very frequently.

Mr. MARSHALL. If your Honor please, we ask that be stricken out, as the contract speaks for itself.

The COURT. We see no objection to it.

By Mr. REED:

Q. Is the type of annexation of this machinery
68 and equipment, then, affected in any manner by that continual interchange of machinery and equipment?

Mr. MARSHALL. We object; it is immaterial whether they had a right to move it or not.

The COURT. That is true; and we are receiving this testimony as a basis for the contention to the contrary, if they can find any such grounds. Undoubtedly, some Pennsylvania cases have held that dies, jigs, and the like are part of the plant, but we are not precluded from making this inquiry, at least; we think it is proper, and we will consider the legal rules later.

Mr. MARSHALL. Grant us an exception.

The COURT. Exception granted.

A. The design of the method of annexation of equipment has always been as simple as possible, to permit these frequent rearrangements of equipment.

Q. Do the changes in the industry require frequent changes in equipment?

A. Yes.

Q. And interchange of machinery?

A. Yes, sir.

Q. Could the same product which is produced in this Borough Township plant be produced by other machinery, even unlike this machinery?

69 Mr. MARSHALL. If your Honor please, I want to offer an objection here, as incompetent, irrelevant and immaterial. The machinery that was used here in this plant was being used, as

agreed in the agreed statement of facts, for manufacturing purposes and that is the machinery that was used as part of the plant.

Mr. Reed. Well, we would concede that, your Honor, but we also know that, as the case stated has said, in addition to the law of Pennsylvania, there must be consideration given to the Act of Congress, in this particular case, because the Court is going to have to determine, finally, just what was intended by that Section 10-D, of the Act of 1941.

The Court. Well, you may inquire as to that and get an answer. Of course, the stipulation, this thirteenth paragraph, at least, indicates that, as assessed, at the time of assessment, the machinery in the plant was essential to the operation of the plant. Now, if you wish to ask him something that may, possibly, vary that, you may do so; you reserved the right to do that, in the stipulation itself.

Mr. Reed. That is right; the stipulation reserved that right.

70 We, of course, do not contend that machinery is not necessary for the operation of the plant, such as was here being operated. This question is whether other machinery could be used for the purpose of manufacturing a product similar to the product which was here being manufactured?

A. Yes.

By Mr. Reed:

Q. And, in addition to the product which is presently being manufactured, could various other products be manufactured, different products, such as washing machines or refrigerators and so on?

A. They possibly could, with additions and deductions to what we have.

Q. Is this building, as constructed, or would that building, as constructed, be available for some other purpose, other than the purpose for which it is presently being used?

Mr. Marshall. We will object to that as immaterial.

The Court. Mr. Marshall, that all goes to the same question, as to whether or not the machinery is to be considered part of the plant, or whether we are to get back to the old conception that the building is to be considered entirely distinctly from it; we will hear this evidence and reach such conclusions as the law requires, under the evidence. We will grant you an exception.

71 A. The building, as designed and constructed, is a typical manufacturing building; it could be placed in almost any city of the country and do almost any manufacturing type of job which has to be done, excepting something that requires a special type of building. It is typical of the industrial building that has been built in the last eight or ten years, for general manufacturing.

By Mr. Reed:

Q. Now, it has been stated, Mr. Bender, that certain machines are bolted to the foundation; will you please explain how those machines, in which bolts are used, are affixed?

A. In every case where a machine is bolted to the foundation, that is done so as to prevent that machine from kicking out of line, during operations, and affecting other nearby machines, and, in that case, a concrete foundation is prepared, through which bolts protrude, these bolts being secured in pipe sleeves, to allow some flexibility of movement; the machine is fitted over those bolts and grouted, and nuts placed on the bolts above the machine. There are, however, only five or six pieces of equipment in the plant that are on foundations like that.

Q. How would you remove those machines?

A. Merely loosen the nuts and jack the machine up; there is no bond between the foundation and the machine.

Q. Would any damage be done to the floor by doing that?

A. No; in most cases, you could merely fill in the space
72 from the foundation to the top of the floor and make the floor similar in appearance and even with the floor in the rest of the building.

Q. How are the other machines, then, connected in place or attached, in places where bolts to the foundation are not used?

A. Well, the machines are heavy enough to sit in position and stay there by themselves. However, in some cases, such as long bedded lathes, due to the war program, the manufacturers have not had enough steel, and they have had to cut out so much steel from the body of the lathe, that they would have to be fastened to the flood, to keep it straight. We have some machinery in this plant today, exactly of the same type, and some of it is bolted and some of it is not, and we have both conditions in other plants doing exactly the same job.

Q. What other type of annexation do you have for these machines?

A. We have no other; just those that sit on foundation and are bolted. We have a few machines that sit on foundations, that are not bolted down; they just rest there. Our main machines just sit on the floor; sometimes, they are lag screwed through, to keep them from moving, creeping sideways, slowly.

Q. If you wish to move that type of machinery, what is necessary?

A. Just picking the machine up and moving it, and, if the bolts remain, just burn them off, in some cases expansion sheathes, and the only damage is to the wood block.

73 Q. Would there be any damage done, other than to the wood block?

A. No.

Q. Could that be replaced, readily?

A. Yes.

Q. Have you had a chance to examine Exhibit No. 1, Mr. Bender?

A. Yes.

Q. Can you tell us, Mr. Bender, from looking at Exhibit No. 1, what machinery has been placed—machinery and equipment has been placed in the plant since December 1942?

A. Yes, I can indicate some of the items on here that have been placed since December 1942.

Q. With the idea of the definite type rather than quantity; can you do that?

A. Yes; the one major item are these electrical circular pit type furnaces, indicated on page 5, a little below the center of the page, "Three circular pit type electric furnaces," and "two convection pit type furnaces." Both those items were put into operation since December 1942.

Mr. MARSHALL. What items are those?

Q. Here they are, "Three circular pit-type electric furnaces," and "two conviction pit type furnaces." Anything else?

A. In the same category are the items on page three, a little above the center of the page, "Six horizontal fluid screw rigid mills," and I believe there were one or two of those units
74 at the plant, in December, although they had not been installed or operated, and, all those that are there now have been installed since December and have been operated since then. That is an item that was caused by change in design and size of the product.

Q. I direct your attention to page six, under "Boiler House," the item of "Three centrifugal pumps"; are they movable? Just tell us how they are installed?

A. Actually, I believe, the intent is that those items are the air compressors, that Mr. Frauenheim had reference to.

Mr. FRAUENHEIM. Boiler feed pumps.

A. Boiler feed pumps?

Mr. FRAUENHEIM. That is right.

Q. The boiler feed pump contains three basic units, a motor, a centrifugal pump and a cast iron case. Both the motor and the pump are bolted to the cast iron base, at the factory, with a flexible or universal coupling. The cast iron base is then set on a concrete pad or foundation, to install the machine at its proper elevation and in line with the piping that would run to it, but they are relatively minor units.

Q. What would be necessary to move those motors, or those pumps?

A. Pardon me?

Q. What would be necessary to move those motors, or those pumps?

75 A. Just disconnecting the piping and loosening the nuts that fasten down the base, and lift the entire unit off.

Q. Now, in addition to the various means of annexation to which you have testified, how are the benches and things like that held in place?

A. A large number of them merely just rest on the floor; some of them are fastened to the floor, the wood block, with nails; some are fastened to the wood block with lag screws, and others that are used for pounding, are fastened into the concrete, with, probably, half-inch bolts and expansion shields; some are fastened in with lead shields; however, in the last four months, perhaps, seventy percent of the benches in the plant were removed.

Q. I didn't hear that.

A. I said, in the last four months, perhaps, seventy percent of the benches in the plant were removed entirely, and put in storage, and the Court can look for evidence of the benches having been there.

Q. Well, did their removal cause any damage of any kind to the freehold or the building?

A. No, none whatsoever.

Mr. Reed. Cross examine.

76 Cross examination by Mr. Marshall:

Q. What are you referring to, when you speak of benches; what do you mean by benches?

A. We use benches for hammering on blades; for a lathe gauge, for determining the dimensions of blades; we use benches to support the blades, while grinding operations are performed, and, also, we use benches for the manufacture of templates, which are used in the manufacture of blades.

Q. These benches are not part of the machinery; they are just usable tables or benches, on which you can lay those blades for checking purposes?

A. That is correct; some are portable; some are fastened down to prevent their moving around.

Q. Well, those benches are not machines at all; they are just like tables?

A. Well, they are just as much a machine as any manufacturing machine is, because they are fitted with gauges that do work, perform a useful operation.

Q. You wouldn't think a mere bench that you lay a blade on, when you want to cool it, would be the same as a shaper, or one of those things, would you?

A. Why, it doesn't perform the same function as a shaper.

Q. Mr. Bender, you say you removed all that machinery from the Neville Island plant, to Beaver, except one piece, which you sold; you operated that plant on Neville Island as a manufacturing plant, in making propeller blades?

77

A. Yes.

Q. After you moved the machinery all out, what did you have in your plant?

A. On Neville Island?

Q. Yes; it was an empty building, wasn't it?

A. Yes.

Q. When you moved your machinery out, you didn't have any manufacturing plant left, on Neville Island, at all, did you?

A. We didn't.

Q. That is what I say; you had an empty building; you brought that machinery to this plant and installed it, and you used it there to manufacture aircraft propellers?

A. Yes.

Q. Now, this machinery that you had in the plant in Allegheny County, was in a leased building; you leased the building from——

A. The Pittsburgh Screw and Bolt Company.

Q. The Pittsburgh Screw and Bolt Company?

A. Yes.

Q. Who owned the machinery in the Neville Island plant?

A. Part of it was owned by Defense Plant Corporation, and part of it was owned by Curtiss-Wright.

Q. And, you brought it all down and installed it in the Beaver plant?

A. Yes.

78

Q. And, it is all being used there, now, in connection with the present plant?

A. No.

Q. Well, anything that you haven't taken out is being used?

A. Well, there might be some that is not used, that hasn't been taken out.

Q. Well, it was brought in here, in connection with the Beaver plant, wasn't it?

A. Yes.

Q. Now, the machinery that was installed in the plant here is being used for one purpose, and that is the manufacture of aircraft propellers?

A. Yes.

Q. Now, then, you say you had some furnaces that have been moved from one point to another; if you did move them from one point to another, in the building, did you still use them in

connection with the plant, or the manufacture of propellers; that is correct, isn't it?

A. Yes.

Q. Now, when a machine is broken or worn out, or, for any reason, you want to exchange it and replace it with another machine, then, the new machine takes the place of the old, and it is used in connection with the plant, in the same capacity; that is true, isn't it?

A. It could be; yes.

Q. Well, isn't it true, when you bring in a new machine, it is used in connection with your manufacturing plant?

79 A. Yes.

Q. And, all the machinery that is down in that plant is used in connection with the Curtiss-Wright Corporation, under this lease, for the manufacture of aircraft propeller blades?

A. Yes.

Q. Who determines the question of what machines shall be taken out and replaced in the Curtiss-Wright plant in Borough, Township?

A. It might be determined by the Plant Engineering Department, or it might be determined by some other department in the plant, or it might be determined by the Army Air Corps, or by the Defense Plant Corporation, depending upon conditions and circumstances.

Q. I understood you to say that some of the machines are put on cement foundations and bolted down?

A. A very few.

Q. Others are not put on cement foundations and bolted down to the cement floor that is underneath that seven inch wood block floor?

A. That is correct.

Q. That particular wood block floor just rests on top of the cement slab; the seven inch wood slab?

A. That is right.

Q. And you have it floored over, and if you want to bare the cement any place, to put a machine in, you simply lift out whatever blocks are necessary, and, if it is necessary to put

80 a foundation in there, you put it in on top of the cement base, and, if you wish to put lag screws or bolts in, you put them in the cement, and let them extend out above the floor?

A. If a cement base is necessary, it is necessary to go through the floor.

Q. Don't you have several machines installed in that plant, under which you have built foundations that go completely through the cement slab?

A. Yes; there are a few.

Q. These machines, whether bolted down or screwed down, or bolted on the foundation and resting on their own base, those machines are all used for different purposes, in connection with the manufacture of aircraft propellers, in that plant?

A. That is right.

Q. Are the Curtiss-Wright machines that were brought down from the other plant intermingled with the Defense Plant Corporation machines?

A. To my knowledge; yes.

Q. Mr. Bender, when you removed one of those large machines, you said, a few minutes ago, that you pulled it out; how do you repair a situation like that?

A. Well, in almost all cases the foundation is below, the top of the foundation is below the level of the floor.

Q. What do you do to repair it?

A. We put a fill of dirt, up to the level of the bottom of the concrete floor, pour a new concrete floor in that area, and put wood blocks in there, and that gives a uniform, level floor throughout, without there being any evidence of a foundation left below.

Q. Now, you have some others that rest on the level of the floor, that you have fastened to lag bolts in the cement floor, through the seven inch slab; now, when you take one of those machines out, who do you do with those bolts that are sticking up through the cement; do you saw them off or how do you get rid of them?

A. If the bolt was put in with the head down and the threads up, we saw it off or burn it off, but most of them are put in with the threads down, into a lead expansion sheath; in those cases, we just unbolt them.

Q. As I understand you, you bore a hole in the cement, drive a lead plug in, and screw them in?

A. Yes.

Q. And, that screws it down in the same manner as if the bolt were reversed and you bolted it down with a nut?

A. That is correct.

Q. Did I understand you to say that some of these heavy machines are set right on top of these two inch blocks, with a lag screw into the block itself, to hold them in place?

A. That is right.

Q. What kind of machine would that be?

A. Some of the welding jigs we installed there, or some of the milling machines that were installed in there, in that manner; and some aren't even held by a lag screw; the only reason we use a lag screw is to prevent the machine from walking sideways, due to vibration. It is not necessary to hold the machine down; the machine is heavy enough itself.

Q. That would be machines used for light work?

A. It might do very heavy work, but the movement of the machine is caused by the velocity of the moving parts.

Q. And, due to the severe vibration, that machine has to be screwed down in the same way, too?

A. Usually, yes.

Mr. Marshall. That is all.

Mr. Reed. If the Court please, we have brought some pictures, but, if your Honor is going down there, we will not introduce them.

The Court. Just one question that I would like to ask Mr. Bender; it probably has been covered but I might understand it better, if I state it in my own way and get an answer.

By the Court:

Q. Would you say, Mr. Bender, that at the time this as-
83 sessment was made, in 1942, the machinery which was installed in that plant, and being used in the plant at the time, was reasonably necessary to the operation of the plant, in making the product for the production of which the plant was designed? Maybe that is a little involved.

A. Well, it is; because we designate the plant as the building, and you designate it here as the building and equipment.

Q. Of course, we are not considering ourselves bound by your construction of what the plant is. We are simply inquiring: here is a building; something is being done in that building; by the use of certain machinery, and, as a result of that, there is a certain production. Now, was the machinery that was installed in that plant, and used at the time the assessment was made, reasonably necessary to manufacture that product?

A. The machinery that was installed and in use was necessary, at that time, for the manufacture of hollow blades.

Q. Of course, you stated that the building could be used for a great variety of manufacturing purposes?

A. That is correct.

Q. But, in doing that, there would have to be installed such machinery and equipment as would be proper for the making of the product it was desired to manufacture?

A. I agree with the statement.

Q. This may be merely a matter of curiosity, but you
84 stated that a piece of machinery there was recently removed and was sent down to the plant in New Jersey?

A. Well, we move machines at the rate of one or two a week, sometimes; in fact, in three weeks time from now we are going to move forty-five machines out.

Q. That is what I was getting at; is that your practice, to move machinery from one plant to another?

A. It is a very unhappy habit for us.

Q. Why do you do that?

A. To take advantage of machinery that is available, if it is critical; not to have to go out and buy it.

Q. When you move a piece of machinery from that plant in Borough Township, do you generally replace it by something else, or has it become unnecessary?

A. It depends; occasionally, we remove a piece of machinery out and we know another one will be in within a few weeks, to replace it, if we don't need it, but, it may have become obsolete because of a change of design in the product.

Q. I presume, in your business, it is the same as in other businesses, you attempt to improve the design of your product?

A. That is the basis on which we do our business.

The COURT. We think that is all.

85 Redirect examination by Mr. REED:

Q. Mr. Bender, are there frequent changes in the design of propeller blades?

A. Yes; very, very frequent; they are constantly changing.

Q. And, is that one reason for such a constant change of machinery and equipment?

A. Yes. Usually a change in design means a change in procedure for manufacturing, not only because of change in size but because of physical characteristics that are required. It is entirely possible to assume that six months from today that equipment in the Borough Township plant could be obsolete, and entirely new equipment installed to replace it, because of a basic change in procedure.

Q. And, is that a necessary risk that you must expect in the manufacture of propeller blades?

A. Yes; that is because there is no choice but to make a quick change to do that; if the Government requires a new type of propeller, for a new type of airplane that is superior to anything that has been designed heretofore, you can't say, "No, we can't change; because it costs too much money," you must change.

Q. Is that typical of the airplane industry?

A. Unfortunately, yes; that, perhaps, explains why we have been partially successful.

Q. And, would you say that the airplane industry differs, in a large degree, from other industry, in that connection?

86 A. I think there are a few other industries that have been equally as progressive in their thoughts and actions; automobile body development is one, and plastics, and plasticizing, is another.

Q. Well, is there anything static about the airplane industry?

A. I don't think I am qualified to answer that question.

Q. Suppose all the equipment and machinery was moved out of that plant, could it still serve a useful purpose?

A. Oh, yes.

Mr. MARSHALL. We object to that.

The COURT. What is the use of objecting to it? We all know it is meaningless, from the standpoint of the Pennsylvania rule.

Mr. REED. That is correct.

The COURT. We don't understand why you have spent so much time on it. He has already testified to that effect. Answer the question.

By Mr. REED:

Q. Without any equipment, it could be used as a warehouse, couldn't it?

A. Yes, it could.

Mr. REED. Cross-examine.

87 Re-cross-examination by Mr. MARSHALL:

Q. If you took all this machinery out and used this building for a skating rink, it wouldn't be a manufacturing plant, would it?

A. Obviously not; obviously, if you used it for a skating rink, it would be that.

Mr. MARSHALL. That is all.

Mr. REED. That is all.

Mr. MARSHALL. Your Honor, I would like to renew my objection to all of this testimony having to do with the removal or substitution of machinery, as incompetent, irrelevant and immaterial, and having nothing whatsoever to do with the question at issue. We offered testimony to show the method of installation, to show how the machines were installed, and the question of removal or substitution of other machinery has nothing to do with the question of the assessment of the property and machinery that was in there, at the time the assessment was made, and being used in connection with the manufacturing plant, and necessary and essential for its operation as such.

The COURT. We think we will permit it to stand, subject to you objection, and grant you an exception. It tends only,

88 it seems to us, to show the character of the business with reference to possible changeableness of any equipment, and, as bearing upon the manner of installation, possibly, and the relation of the equipment to the building itself. We may conclude, after all, that it is meaningless in this case, if we find that Judge Drew was right, invariably, but, if we take a different

view, it might be worth while considering. Of course, notwithstanding these changes, Mr. Bender, we think we all understand this, there are changes in every business, changes in methods, changes in products, changes in practice and design, but, at any particular moment, they may do some particular thing, and they would make it with some particular machinery and equipment, and, if you assessed it at that time, that is the property you are assessing.

* * * * *

FRIDAY, JUNE 25TH, 1943.
Nine o'clock A. M.

Hearing resumed pursuant to adjournment:
Present: Honorable Frank E. Reader, P. J., Honorable Henry H. Wilson, J.
Appearances: Counsel, same as before.

Stipulation re assessment

89 MR. CRAWFORD. May we stipulate on the record that the assessment of three hundred and eighty-eight thousand dollars does not include the boiler house and equipment as listed in County's Exhibit No. 1, page 6?

MR. MARSHALL. That is all right.

MR. CRAWFORD. That may be stipulated?

MR. MARSHALL. Yes; this is his list of machinery and the type of installation.

MR. CRAWFORD. In other words, in the assessment of the boiler house, in the stipulation, the items shown on Exhibit 1, page 6, were not included?

MR. MARSHALL. Yes; that he didn't include those figures in the cost of machinery that Mr. Bender gave us.

MR. CRAWFORD. We can put Mr. White on the stand, to prove that.

MR. MARSHALL. You can add to the stipulation that I am informed that the appraised value of the machinery, as set forth in the assessment, does not include the boilers installed——

90 MR. CRAWFORD. And the boiler house item shown on page 6 of Exhibit 1?

MR. MARSHALL. That is all right.

MR. CRAWFORD. Is that all right?

MR. MARSHALL. O. K.

MR. CRAWFORD. I think that covers it.

MR. MARSHALL. I would like to ask Mr. White one question.

J. E. WHITE, having been previously duly sworn, was recalled and testified further, as follows:

Further cross-examination by Mr. MARSHALL:

Q. Mr. White, who owned the machinery that was in the Curtiss-Wright plant on Neville Island, before it was removed to Beaver?

A. The machinery in operation at Neville Island, part was owned by the Defense Plant Corporation, and part was owned by Curtiss-Wright Corporation.

Q. Do you know in what proportions?

A. I am sorry, I wouldn't have any figures available, at the present time.

Q. At the time they operated the plant at Neville Island,
91 the Defense Plant Corporation was interested in the production of aircraft propellers; wasn't it?

A. I don't quite understand that question.

Q. Strike that question out. At the present time, this plant is leased by the Defense Plant Corporation to the Curtiss-Wright Corporation?

A. The Borough Township plant: yes.

Q. In other words, there was some arrangement between the Defense Plant Corporation and the Curtiss-Wright Corporation, as to this plant on Neville Island, prior to its being moved to Borough Township; what was that arrangement?

A. The agreement of lease between Defense Plant Corporation and Curtiss-Wright Corporation was in existence prior to the completion of the Borough Township plant. To expedite production, certain of the equipment under the lease was originally installed in the Neville Island plant, pending completion of the Borough Township plant.

Q. Then, the arrangement between the Defense Plant Corporation and Curtiss-Wright Corporation, as to its Neville Island plant, originated just about the time that arrangements were made for building the new plant in Borough Township, is that correct?

A. Well, the agreement of lease was dated March 5th, 1941; prior to that time, we had the operation at Neville Island.

Q. Under the complete management of Curtiss-Wright Corporation?

A. That is correct.

92 Q. All right; now, when you moved to Borough Township, you brought from the Neville Island plant the machinery that was owned by the Curtiss-Wright Corporation, and also any machinery that had been installed in the Neville Island Plant by the Defense Plant Corporation, and leased to the Curtiss-Wright Corporation?

A. That is correct.

Q. Do you know, when you brought all of that machinery to Borough Township, whether or not the Curtiss-Wright Corporation deeded that or sold that to the Defense Plant Corporation, in connection with its ownership of the rest of the plant, or did you just mingle it in with what we have indicated by Mr. Bender?

A. The original corporate owned assets, located at the Neville Island plant, have not been deeded to the Defense Plant Corporation; there may be one or two exceptions to that, but they would be minor.

Mr. MARSHALL. I think that is all.

Redirect examination by Mr. REED:

Q. Is any of the machinery which was originally in the Neville Island plant still in use at the Borough Township plant, or has it all been removed or become obsolete?

93 A. Without checking the records, it would be a little hard to say, exactly, but I am sure there is considerable of the original equipment presently being utilized.

Q. What proportion of the equipment in the Borough Township plant, in December 1942, was owned wholly by the Defense Plant Corporation, and what proportion of the machinery belonged to the Curtiss-Wright Corporation?

A. Of the total machinery located in the Borough Township plant in December, approximately ninety percent, the title was vested in the Defense Plant Corporation; the remaining ten percent were corporation owned assets.

Q. When you say, "ninety percent, title was vested in the Defense Plant Corporation," was the payment for that ninety percent made for the Defense Plant Corporation, or was it purchased as their own equipment?

A. Under the agreement of lease, Curtiss-Wright acts for and on behalf of the Defense Plant Corporation, and, in that capacity, they arrange for the procurement of the machinery; the bills for the machinery so ordered are paid by Defense Plant Corporation, through one of the Federal Reserve Banks, either New York, Chicago, or Cleveland.

Q. Payment is not made by Curtiss-Wright Corporation, then, even in the first instance?

A. In the first instance; no.

Q. Mr. White, Mr. Marshall used the word "mingled"; was the machinery "mingled"; is there any mingling of De-

94 fense Plant owned or Curtiss-Wright owned, or, is each machine designated in some manner?

A. Under the terms of our agrement of lease, we are responsible for the proper identification of all Defense Plant Cor-

poration owned assets, which are, in turn, leased to us. This identification is accomplished by means of serial inventory numbers, marked in private places on the equipment, as well as affixing a tag, which clearly identifies that piece of property as the property of the Defense Plant Corporation.

Q. Is the Curtiss-Wright machinery also tagged?

A. The corporate owned assets are appropriately marked, by a tag, also.

Q. Mr. White, you have used the words, "corporate owned assets", do you mean by that, Defense Plant owned, as well as Curtiss-Wright owned; is that just one general term that you are using there for all the assets, or what do you mean by that?

A. When I speak of "corporate owned assets," I refer, of course, to my own corporation, Curtiss-Wright Corporation owned assets.

Mr. Reed. That is all.

Re-cross-examination by Mr. Marshall:

Q. Speaking about your identification, you have a record of each machine in the plant, regardless of who owns it, isn't that correct?

A. A fixed asset record.

95 Q. Well, the machines that are now there, you have a number on each machine, and, also, that record, or that list of machines also shows who owns each machine; that is the way you determine the ownership, in the office, and not out in the plant?

A. Yes; we have an inventory, or a fixed assets record, as we refer to it.

Q. Now, when you brought your machines down and placed them in the plant, for use for manufacturing purposes, you put each machine at the point in the plant where you wanted to use it, regardless of whether it belonged to your corporation or the Defense Plant Corporation, isn't that correct?

A. Yes; I would say that is true, because there are a great many of the machines that are identical or similar in nature.

Q. But, you didn't take all the machines, regardless of what type, that you owned, owned by Curtiss-Wright Corporation, and place them in one corner of the plant, to keep them away from the others?

A. No.

Mr. Marshall. That is all.

Mr. Reed. There is just one question: Speaking of the 96 records, did you, for the purposes—that is all, Mr. White; we could go on indefinitely, so I think we ought to quit. That is all, Mr. White.

(Witness excused.)

Mr. REED. We rest.

Mr. MARSHALL. The County rests.

(Whereupon, the appellant rested its case.)

(Whereupon, the appellee rested its case.)

(Testimony closed.)

(Discussion here ensued, which was not reported.)

Beaver County Exhibit No. 1

DEFENSE PLANT CORPORATION

CURTISS-WRIGHT CORPORATION—PROPELLER DIVISION, LESSEES

Borough Township, Beaver County, 6/23/43

The total machinery and equipment assessment, as fixed by the County Commissioners for the year 1943 is $388,000.00.

It is understood that approximately all of the above list of machinery and equipment was installed on these premises prior to December 31, 1942.

Very respectfully submitted.

H. T. FRAUENHEIM,
Machinery Appraiser.

97 *Defense Plant Corporation—Curtiss-Wright Corporation—Propeller Division, Lessees*

Borough Township, Beaver County	6/23/43
	H. P.
Main Plant Building, approximately 600' x 600'	
1 E. O. T. Crane—5 T. (Niles)	3½
1 E. O. T. Crane—10 T. (Niles)	7½
1 Vertical Drill Press (Cinci.)	7½
1 48" x 8' Eng. Lathe (Cinci.)	44-30
44 Special 36/96 Hydr. Milling Machs. (Cinci.)	4-7½
4 34/60 Hydr. Milling Machs. (Cinci.)	5-5½
5 No. 2 Plain Cutter Grinder (Cinci.)	15
1 Milling Machine, 144" table (Fitchburg)	6-30
6 Horizontal Fluid Screw Rigidmill (Sunstrand)	4-100
4 Surface Grinders—E. D., (Hanchett)	2-7½
2 Vertical Jig Boring Milling Machs. (R. P.)	6-7½
5 24" x 16' Eng. Lathes—H. D. (Boye & Emmes)	6-7½
6 24" x 11' Eng. Lathes (Monarch)	2-7½
2 22" x 19' Eng. Lathes (Monarch)	5
1 22" x 15' Eng. Lathes (Boye & Emmes)	5-15
5 No. 4-A Turret Lathe (Warner & Swasey)	3-5
3 Thread Milling Machs. (Lees-Bradner)	20
1 36" x 108" Eng. Lathe—H. D. (LeBlonde)	2-7½
2 No. 2 Plain Cutter Grinders (Cinci.)	2-15
9 No. 5-P, H. D. Polishing Lathes (Gardner)	60
3 2000 T. Hydraulic Pressers (Bridsboro)	60
1 1500 T. Hydraulic Pressers (Bridsboro)	2-10
2 300 T. Hydraulic Pressers (Bridsboro)	7½
1 No. 7 End Punch (Beatty)	2-125
2 3000 T. Hydraulic Presses (Bridsboro)	8-7½
8 24" x 16' H. D. Eng. Lathes (Boye & Emmes)	2-7½
2 24" Shapers (G. & E.)	6-7½
6 32" Shapers (G. & E.)	

Defense Plant Corporation—Curtiss-Wright Corporation—Propeller Division, Lessees—Continued

	Borough Township, Beaver County	6/23/43
	Main Plant Building, approximately 600' x 600'—Continued.	*H. P.*
	1 36" Shapers (G. & E.)	10
	1 48" x 48" x 12' Hypro Planer (Cinc.)	25
	1 Hor. Boring, Drilling & Milling Mach. (G. & L.)	10
	2 No. 36 Univ. Mill. Mach. (Van Norman)	2-5
	2 18" x 78" Pacemaker Lath (American)	2-10
99	1 22" x 120" Pacemaker Lathe (American)	15
	1 [illegible]x 54" Pacemaker Lathe (American)	7½
	1 No. 4 Univ. Milling Mach. (Cinc.)	15
	1 No. 2 Univ. Cutter & Tool Grinder (Cinc.)	3
	1 5' Radial Drill (American)	10
	1 No. 60 Drill Grinder (Sellers)	2
	1 60" x 30" Cylindrical Grinder (Norton)	7½
	1 No. 5 Jig Boring & Milling Mach. (R. & P.)	7½
	1 Plain Self Contained Grinder (Cinc.)	20
	1 No. 5 Jig Boring & Vertical Mill Mach. (R. & P.)	7½
	2 36" Shapers (Gould & Eberhardt)	2-10
	3 Special Thread Mill. Machs. (Lees-Bradner)	3-3
	1 75 Ton Hydraulic Press (Hannifin)	10
	7 Simplimatic Lathes (Gisholt)	7-15
	6 24" x 16' Eng. Lathes (Boye & Emmes)	6-7½
	4 No. 74 Centerless Grinder (Heald)	4-5
	2 Traversing Wheelhead Grinders (Cinc.)	2-7½
	3 24" x 16' H. D. Lathes (Boye & Emmes)	3-7½
	1 24" x 16' H. D. Lathes (Boye & Emmes)	7½
100.	6 #7 Grinders (Wolfe)	6-3
	2 #10 Roto Clone Units	3
	1 Automatic Wire-cutting mach. (Lewis)	5
	1 Doall Contour Mach	5½
	1 Doall Contour Mach	5½
	2 Duplex 2-stage Horiz. Air Compressors (Worth.)	2-175
	2 Horiz. 2-stage Air Compr. (Gardner-Denver)	2-20
	1 60,000 lb. Testing mach. (Southward)	7½
	1 Auto. Stub. Lathe (Sunstrand)	5
	1 Auto. Stub. Lathe (Sunstrand)	5
	4 No. 600 Combustion Controller (Selas)	4-40
	3 Circular Pit-Type Elec. Furnaces, 27 K. W.	3-2
	2 Convection Pit-Type Fur. 225 K. W. H	2-7½
	2 No. 2 Cutter Grinders (Cinc.)	2-3
	1 Pipe-threading mach. (Toledo)	3
	1 Do All Contour Mach	5½
	1 6" x 6" Metal Saw (Peerless)	3
	1 Model 10 Grinder (U. S.)	2
	1 316" Jointer (Yates)	1½
101.	1 32" Band Saw (Northfield)	5
	1 Univ. Iron Worker	3
	1 ¾" x 50" Power Squaring Sheer (Stam)	40
	3 Hydraulic Saws (Racine)	3-2
	2 5" High Duty Forging Machs. (National)	2-100
	2 Induction type furnaces (Tocco)	2-225
	1 Car type Draw Furnace G. F. 48" x 54" x 24" (Swindell)	5
	1 Platform Scale 10-T. (Howe)	5
	Boiler House:	
	2 Vertical Boilers C. F. Stoker fired (Comb. Engineering)	2-500
	3 Centrifical Pumps (Worthington)	3-10
	1 Vertical Hot Water Heater (Ins.)	
	1 Tile Silo, cap. 300T	
	2 Vertical steel tanks 6' x 14'	1
	Main Plant Building, Approximately 600' x 600' (continued):	
	112 Atomic Hydrogen Welding Transformers 7½ Amp. each	
	5 5-Ton Elec. Trucks (Yale)	
	Small grinders and other hand tools, all necessary in the production of the articles manufactured in this plant.	

102 In Court of Common Pleas of Beaver County

Opinion and order

Filed June 8, 1944

JUNE 7, 1944.

READER, *P. J.*

The above-entitled case is before us on an appeal by Defense Plant Corporation from the assessment of certain property owned by it in Borough Township, Beaver County, Pennsylvania, for the purpose of local taxation. Following the filing of the appeal a hearing was had at which considerable testimony was taken, and in connection with which counsel for Defense Plant Corporation, and counsel for the taxing authority filed an agreed statement of facts. From the agreed statement of facts and the testimony taken we find the following facts which seem to us to be the only facts material to the determination of the question involved:

FINDINGS OF FACT

1. Defense Plant Corporation, appellant herein, is a corporation created by the Reconstruction Finance Corporation, pursuant to Section 5d of the Reconstruction Finance Corporation Act of Congress, as amended.

2. The Township of Borough is a first-class township in Beaver County, Pennsylvania.

3. The County Commissioners of the County of Beaver, pursuant to the General County Assessment Law, Act of 1933, P. L. 853, Section 501, Purdon's Pa. Stat. Annot. Title 72 (5020-
103 501), as amended, constitute the Board of Revision which hears appeals from assessments from Borough Township and other taxing districts in the County of Beaver.

4. John Howard Pew, et ux., et al., by deed dated April 15, 1941, and recorded in the Recorder's Office of Beaver County, Pennsylvania, in Deed Book 481, page 201, did grant and convey unto Defense Plant Corporation, a corporation created by the Reconstruction Finance Corporation, pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended:

All those certain lots or pieces of land situate in the Township of Borough, County of Beaver and Commonwealth of Pennsylvania, being parts of Academy Lots Nos. 11, 12, and 13; all of Academy Lots Nos. 14 and 15, in the General Plant of Academy Lots, adjoining the Town of Beaver, and part of Outlot No. 1 in the General Plan of Outlots adjoining the Town of Beaver, lying together and together bounded and described as follows:

Beginning at a point in State Highway L. R. 278, commonly known as Route No. 930 at the intersection of the northwesterly side of Georgetown Lane with the center line of Tuscarawas Road, as originally located; thence along the extended northwesterly side of Georgetown Lane, South 54°42′ West 1731.49 feet to the center line of Walnut Lane; thence along the center line of Walnut
104 Lane, North 35°18′ West 859.28 feet to the southerly side of Division Lane; thence along the southerly side of Division Lane and lands now or formerly of Mary J. Harton, North 54°49′ East 255.46 feet to a point; thence along said lands, now or formerly of Mary J. Harton, North 48°40′ west 16.97 feet to a point; thence by other lands of the grantors North 54°49′ East 1283.89 feet to a point in the center of the Tuscarawas Road, as originally located at line of land now or formerly of John S. Sweesy, along the center line of said Tuscarawas Road as originally located South 48°00′ East, 900.92 feet to the place of beginning.

5. Defense Plant Corporation erected on said premises certain buildings and caused the machinery specified in the assessment, hereinafter referred to, to be placed in said buildings.

6. Defense Plant Corporation leased the land, buildings, and machinery to Curtiss-Wright Corporation, a private corporation organized under the laws of the State of Delaware for the manufacture of aircraft propellers as set out in said lease, and from which private profit may be derived by the Curtiss-Wright Corporation. A copy of this lease is attached to the agreed statement of facts, showing the date of the lease to be March 5, 1941. Said Lease Agreement has been amended from time to time but not in any manner affecting the questions presented by this appeal.
105 7. In this appeal there is no dispute as to the amounts of the valuation of the property assessed for the triennial assessment for the years 1943, 1944 and 1945.

8. James W. Eckler, the Assessor for Borough Township, assessed said property of Defense Plant Corporation for real property taxes for 1942, under Section 201 of the General County Assessment Act of May 22, 1933, P. L. 853, as amended (72 Purdons' Statutes, 5020-201, Pocket). An itemization of the property of Defense Plant Corporation, assessed as aforesaid, is as follows:

Nine (9) Acres improved, assessed at $1,100 per acre	$9,900.00
Twenty-four (24) acres, not improved, assessed at $1,000 per acre	24,000.00
Plant building and cafeteria assessed at	338,000.00
Administration Building, assessed at	32,000.00
Boiler House, assessed at	60,000.00
Personnel Building, assessed at	5,000.00
Machinery, assessed at	388,000.00
Total	856,900.00

9. After the tax duplicate had been prepared for the 1942 taxes, and the tax statement mailed to the Defense Plant Corporation, it objected to the inclusion of the machinery, claiming machinery was personal property, and not taxable as real property. On or about the 31st day of July 1942, Curtiss-Wright Corpo-
106 ration paid all 1942 taxes, except upon that part of the property designated as machinery, which has not been paid.

10. At the triennial Assessment made during 1942, the Assessor for Borough Township assessed said property for real property taxes for 1943, 1944, and 1945 triennial period, at the same valuation as previously assessed, and itemized in paragraph 8, above.

11. On March 2, 1943, an appeal was made to the County Commissioners of Beaver County, sitting as a Board of Revision, by Defense Plant Corporation from the assessment made by the Borough Township Assessor, on the grounds stated therein.

12. The County Commissioners of Beaver County, sitting as the Board of Revision, heard Defense Plant Corporation's Appeal on March 2, 1943, and, on March 3, 1943, dismissed the appeal as to the claims for exemption, holding all of the property to be taxable and reaffirmed the assessment made by the Borough Township Assessor.

13. That the machinery of Defense Plant Corporation in its buildings in Borough Township, Beaver County, Pennsylvania, or other machinery, are necessary and essential to its existence and operation as a manufacturing plant for aircraft propellers.

14. The Act of Congress approved June 10, 1941, c. 190 Sec. 3, 55 Stat. 248, U. S. C. A. Title 15 Sec. 610, provided as to Defense Plant Corporation as follows:

107 "Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, County, municipality, or local taxing authority, except as provided in section 742 (a) of Title 31. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use,

storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction
108 Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, (2) the RFC Mortgage Company, the Federal National Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

15. The General County Assessment Law of May 22, 1933, P. L. 853 Sec. 201, provides in part as follows:

"The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes, at the annual rate.

"(a) All real estate, to-wit: Houses, lands, lots of ground
109 and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

16. Article 9, Section 1, of the Constitution of Pennsylvania, provides in part, as follows:

"All taxes shall be uniform, upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes. * * *"

17. In pursuance of the Constitutional authority, above quoted, the Legislature of Pennsylvania in the General County Assessment Law of May 22, 1933, P. L. 853, incorporated Section 204, which provides for the exemption of certain property from taxation. In subsections a, b, c, d, e, and f of said Section 204, are enumerated various classes of public property, used for public

purposes, which are exempt from taxation in Pennsylvania. Subsection 204 (g) reads as follows:

"All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same."

18. At the session of General Assembly held in 1943, subsection 204 (g) as above quoted, was amended by Act No. 81, P. L. 110 158 signed by the Governor May 3, 1943, so that the same at this time reads as follows:

"All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same, but this shall not be construed to include the property, otherwise taxable, which is owned or held by an agency of the government of the United States."

19. From the evidence it appears that the machinery in the plant of the Defense Plant Corporation, in Borough Township, which is the subject of assessment, is placed upon the floor of said plant so that in part it is held in place by its own weight, and in part by attachment to the floor in such manner that it can be removed without damage to the building itself. Not infrequently pieces of machinery have been removed to other plants of Defense Plant Corporation, or the Curtiss-Wright Corporation. Generally the machinery so removed is replaced by other machinery required in the operation of the plant. As hereinbefore stated, it was agreed by the parties that the machinery in the plant at the time of the assessment in question was essential to its existence and operation as a plant for the purposes designed. This was also the testimony of Mr. Bender, the Chief Construction and Plant Engineer (p. 66).

111 DISCUSSION

As originally taken the appeal was from the entire assessment, that is, the assessment of land, buildings, and machinery. By a stipulation entered into by the parties in the course of the proceeding, the appeal was limited to the machinery in question, it being agreed that the land and buildings were subject to local taxation.

Among the grounds of appeal, as originally stated, was the allegation that the taxation sought to be imposed is in violation of the provisions of Article IX, Sec. 1, of the Constitution of Pennsylvania, and the provisions of the General County Assessment Law of Pennsylvania, of May 22, 1943, P. L. 853, providing that public property used for public purposes might be exempt from taxation. This ground was later abandoned by the appellants.

The sole question before us, therefore, is whether the machinery in the plant in question is taxable as real property under the Pennsylvania statute quoted in the Findings of Fact. The determination of this question involves a consideration and construction of the General County Assessment Law of May 22, 1943, P. L. 853, quoted in the Fifteenth Finding of Fact; and of the Act of Congress of June 10, 1941, copies in the Fourteenth Finding of Fact.

In the argument of the case counsel for both parties covered, quite exhaustively, a much wider field than that just indi-
112 cated. We deem it unnecessary to discuss in detail the various questions presented, and the various decisions cited in connection with some of the broader questions involved. We refer to them briefly and generally simply for the purpose of setting the background for the determination of the specific question before us.

So far as we know, the latest case in which the Supreme Court of the United States has passed upon the liability of Federal property and activities to State taxation, is the case of the Appeal of Mesta Machine Company. The opinion in this case was filed May 1, 1944. In the opinion of Justice Jackson the broad rule of law is stated as follows:

"In recent years this Court has curtailed sharply the doctrine of implied delegated immunity. But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. The real controversy here is whether, especially in view of recent decisions, taxing authorities of the Commonwealth of Pennsylvania have infringed this admitted immunity."

Where the Federal Government acts within its constitutional powers, property owned by it and used in such activities, and the activities themselves are exempt from state taxation on con-
stitutional grounds. The Federal Constitution within its
113 sphere is the supreme law of the land. There is no question that this immunity is absolute where the property and activity are those of the Federal Government itself. Other questions arise when the activity is conducted by some agency of the Federal Government which agency is itself the owner of the property employed. It is with reference to situations such as this that the first sentence above quoted from the opinion of Justice Jackson applies. In other words, the tendency of the courts of the Federal Government is to limit the immunity of these agencies of the Government.

It is contended in the instant case by the Board of Tax Revision of the County of Beaver that the fact that the property involved in the question before us, the machinery in Defense Corporation plant, above mentioned, belongs to Defense Plan Corporation and not directly to the Government, deprives it of the immunity claimed. Quite a number of cases have been discussed by counsel in their briefs upon this phase of the case.

One of the cases considered, and apparently relied upon very strongly by counsel for the appellee is the case of Penn Dairies v. Milk Control Commission, 318 U. S. 261; 63 S. C. R. 617 (1943). In this case Mr. Justice Stone, in the course of his opinion, uses the following language:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed
114 by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that the state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v. Mitchell, Supra (269 U. S. 514, 523, 524). And we have held that these burdens save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that on immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York Ex Rel. O'Keefe, 306 U. S. 466, 483, 487."

This is interpreted as depriving agencies such as Defense Plant Corporation of the exemption from local taxation which was enjoyed by the Government itself. This, however, is not the effect of the case, because this is not the question involved in the case.

In consideration of all decisions it is of vital importance to bear in mind that a case decides nothing beyond the issue actually raised in it. The court in passing upon that issue may
state many general principles, but these do not become de-
115 cided rules of law unless they are essentially involved in the decision of the issue. In the Penn Dairies case, Penn Dairies had sold milk to the Government for use by certain of its Armed Forces. It had sold the milk at a price below that fixed by the Milk Control Commission of Pennsylvania. The sale took place within the State of Pennsylvania.

Later the Milk Control Commission undertook to discipline Penn Dairies by imposing penalties for making sales at a price less than that fixed by the Commission. It was held that the requirement that Penn Dairies comply with the regulation of the Milk Control Commission did not impose an undue burden upon the Federal Government, and that Penn Dairies was not relieved from liability for its violation of the regulations of the Commission by reason of the fact that its product was sold to the Federal Government. The Penn Dairies was not an agency of the Government; it was an independent vendor of material to the Government; and it was clearly held in the case that it did not enjoy any immunity by reason of its position as such vendor. The case therefore does not decide at all that the property or activity of an agent of the Federal Government may not be entitled to immunity from local taxation. It decides nothing upon this question.

A somewhat similar question was involved in the case of State of Alabama v. King & Boozer, 314 U. S. 1; 62 S. C. R. 43 (November 11, 1941). In this case King & Boozer sold lumber to contractors for use by the latter in constructing an army
116 encampment for the United States Army. The lumber was sold on a cost-plus-a-fixed-fee basis. The sale by King & Boozer to the contractors was subjected to the Alabama Sales Tax. This tax was chargeable to the seller, but he was required to collect it from the buyer—in this case the contractors, and through them the Government of the United States. The collection of this tax was resisted by King & Boozer on the ground that it imposed finally a burden upon the Federal Government in violation of its constitutional immunity from state taxes. The tax, however, was held by the Supreme Court of the United States to be valid; King & Boozer were held not to be agents in any sense of the Federal Government; but merely vendors of material designed for its use.

To the same effect is the case of Curry v. United States, 314 U. S. 14, 62 S. C. R. 48. This case grows out of the same general state of facts as the King & Boozer case. It is apparent that neither of them undertakes to determine the law as to the immunity of an agency of the Federal Government.

Another case strongly relied upon by the appellee is the case of Railroad Company v. Pennsylvania, 18 Wallace 5; 21 Law Ed. 787. In this case certain municipal divisions of the State of Nebraska undertook to tax property of the Union Pacific Railroad within their limits. It was urged by the Railroad Company that it was an agency of the Federal Government, and that the tax upon its property would unduly burden the Federal

117 Government in the exercise of its constitutional powers.

The Union Pacific Railroad Company was incorporated by Act of Congress. It received certain grants on condition that it render certain services when required by the Federal Government, such as transportation of troops, of the mail, conveyances of Federal messages over its telegraph lines, etc. It was held, however, that the Railroad was not strictly an agency of the Federal Government. It was essentially a private rather than a public corporation. The tax was upheld. The Court in its opinion discussed at some length the general principles involved, some of which will be quoted in connection with another case to which we are about to refer. The case, however, does not seem to us to be an authority in support of the proposition that the property of a governmental agency does not enjoy in any event the same immunity from local taxation as the Federal Government itself.

A more recent case is that of James, State Taxation Commissioner of West Virginia v. Dravo Contracting Company, 302 U. S. 134; 58 S. C. R. 208 (1937). Dravo Contracting Company, a Pennsylvania corporation, and entitled to do business in the State of West Virginia, in the years 1932 and 1933 entered into four contracts with the United States for the construction of locks and dams in the Kanawha River, and locks in the Ohio River. The State Taxation Commissioner assessed Dravo Corporation for the years 1933 and 1934 for a tax based upon
118 the gross amounts received from the United States under these contracts. The Court first held that the State of West Virginia could levy its tax only upon such proceeds as arose from work done for the Government within the territorial limits of the State of West Virginia. It then considered the question as to whether the tax was invalid on the ground that it laid a burden upon the Federal Government. It was held that it did not in any sense burden the Federal Government, and that the contractor could not claim immunity from the tax on this ground. It was also held that the Dravo Contracting Company was an independent contractor, and that the tax was not laid upon the contract of the Government, but solely upon the earnings of the contractor. In consideration of the questions involved in this phase of the case the Court, in its opinion, used the following language, quoted from the Peniston case, hereinbefore referred to (58 S. C. R. 218):

"Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States. 'Taxation of the agency is taxation

of the means; taxation of the property of the agent is not always, or generally, taxation of the means." Thomson v. Union Pacific Railroad, 9 Wall. 579, 591, 19 L. Ed. 792. In expounding the grounds for the conclusion that the property of the
119 contractor was taxable, the Court envisaged the serious consequences which would follow if immunity were maintained. In Union P. Railroad Co. v. Peniston, 18 Wall. 5, 33, 36, 21 L. Ed. 787, the Court said:

"'It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stagecoaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the
120 Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents; but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers'."

We call attention to only one other case, also a recent one. It is the case of Graves v. New York et al., 306 U. S. 466; 59 S. C. R.

595 (1939). We quote at some length from this case because it seems to us to state clearly and fully the principles of the law upon the phase of the case which we are now considering. Graves was an employee, in the State of New York, of Home Owners' Loan Corporation. His salary as such employee was subjected to payment of an income tax under a New
121 York statute. He claimed a refund of the tax on the ground that his salary was constitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government, and that he as an employee of said corporation was engaged in the performance of a governmental function. It will be observed that this case does not involve the question of the taxation of a Federal agency. It is clearly held that the tax was not upon the Home Owners' Loan Corporation, was not paid by it, and was not paid from the funds of the Federal Government. In passing upon the question involved, the Supreme Court said, among other thing (pp. 596, 597, 598):

"The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by Sec. 4 (a), 12 U. S. C. A. Sec. 1463 (a), to be an instrumentality of the United States. Its shares of stock are wholly government-owned. Sec 4 (b). Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

"For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. Kay v. United States, 303 U. S. 1, 58 S. Xt. 468, 82 L. Ed., 607.
122 As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. * * * And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. * * *.

"The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal govern-

ment, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning. McCulloch v. Maryland, supra, pages 435, 436 of 4 Wheat.,
123 and possible differences in application, deriving from differences in the source, nature, and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. Helvering v. Gerhardt, supra, pages 412, 413, 416, 58 S. Ct. pages 972, 973.

"So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. * * *"

* * * * * *

"The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is
124 plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

"The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable. * * *"

125 We think a consideration of the cases hereinbefore discussed and quoted is sufficient to establish that there is no clearly defined rule that property owned by an agency of the Federal Government is necessarily deprived of immunity and subject to local taxation by that fact alone. The nature of the relation of the agency to the Federal Government must, of course, be considered, and the final test, as indicated in the cases considered, is the effect of the tax upon the performance of the functions of the Federal Government.

We are satisfied that we cannot decide the present case solely on the ground that the machinery taxed belongs to Defense Plant Corporation rather than to the Federal Government itself. Where the property is owned by the Federal Government directly, or the activity is that of said Government, the exemption is conclusively implied. For that reason the recent decision in the Mesta Machine Company case does not, in our judgment, control the instant case.

We come, then, to a consideration of what seem to us to be the controlling factors in the present case, the Pennsylvania General County Assessment Law of May 22, 1933, and the Act of Congress approved June 10, 1941. The Pennsylvania statute is copied in part, so far as necessary for our purpose, in the 15th finding of fact. It is conceded by appellant that under this Statute, and the Pennsylvania decisions, machinery located in a Pennsylvania mill or manufactory, and necessary and

126 essential to the existence and operation thereof, is treated, for local tax purposes, as real estate, regardless of the title thereto, or the views of the parties interested therein as to its character, or of its method of affixation to the freehold. Notwithstanding this concession to the Pennsylvania rule, appellant seems to regard the rule as a rather unusual and abnormal development in the law of this State. We think, therefore, that in considering the so-called Pennsylvania rule in connection with

the interpretation of the Act of Congress referred to, it is important to more carefully consider the significance of the Pennsylvania rule. It is not a rule devised for the purpose of reaching a new subject of taxation.

One of the earliest and leading cases in which the rule is stated is that of Voorhis v. Freeman, 2 W. & S. 116. This case did not involve a question of taxation at all. It involved the question of title to certain machinery and appliances in a mill which had been the subject of two sheriff's sales. The first sale was by virtue of a writ of levari facias on a judgment on a mortgage covering a lot or piece of ground, and one iron rolling mill establishment, with the building, apparatus, steam-engine, boilers, etc., part of said establishment. The purchaser at this sale claimed the machinery in question as having passed as part of the real estate. Certain of the machinery or appliances was subsequently sold on a writ of fieri facias and the purchaser at this sale
127 claimed the same. The question was whether the machinery in the plant and constituting a part thereof, was to be treated as real estate or personal estate. It was held that it passed as part of the real estate. The opinion in the case was by Chief Justice Gibson. It is interesting and instructive as showing the basis of the rule established. In part the opinion reads as follows (pp. 117, 118, 119):

"It is true we ruled in an unreported case (Chaffee v. Stewart) that the spindles and other unattached machinery in a cotton-mill, were personal property for purposes of execution, on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but on examination of their foundation would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear bird's-eye view of it has been spread before the profession by Mr. Justice Cowen in Walker v. Sherman (20 Wend. 636), from which it is evident that no distinctive principle pervades the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case, is that the court adhered to the old distinction when the question related to a woolen factory, instead of following out the principle
128 started by Mr. Justice Weston in Farrar v. Stackpole (6 Greenleaf 157), which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and

improvements of the age. By the mere force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. * * * Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment; and it is the principle of
Farrar v. Stackpole, glanced at by Lord Mansfield in
129 Lawton v. Lawton (1 H. B. 259 note), who seems to have foreseen its day."

We think the discussion of Chief Justice Gibson clearly establishes the reasonableness of the rule. It was not an accidental or experimental venture. It grew out of the recognition of economic and industrial conditions as they had developed and were developing in the Commonwealth. It is a striking illustration of the truth of the statement of Justice Holmes in his book "The Common Law" to the effect that "The life of the law has not been logic, it has been experience." Like many other principles of law now quite generally accepted, this principle grew up out of the usages and necessities of the community. The rule was followed shortly thereafter in the case of Pyle v. Pennock, 2 W. & S. 390. The rule has been variously applied in the following cases: Patterson v. Delaware Company, 70 Pa. 381; Titus v. Poland Coal Company, 275 Pa. 431; Commonwealth Trust Company of Pittsburgh v. Harkins, 312 Pa. 402; Pennsylvania Chocolate Company for use, v. Hershey Brothers, 316 Pa. 292; Central Lithographing Company v. Eatmore Chocolate Company, 316 Pa. 300; Roos v. Fairy Silk Mill, 334 Pa. 305; McClure v. Atlantic Rock Company, Inc., 339 Pa. 296; Mesta Machine Company Case, 347 Pa. 191.

In the majority of the cases cited the question involved was not a question of taxation at all. In one of the cases above referred
to, the Harkins case, the question was as to whether
130 certain machinery placed in, and an essential part of the manufacturing plant was to be regarded as real estate, and as such subject to the lien of a mortgage of mortgages. In

this case the Court said, in the opinion by Justice Schaffer (312 Pa. 402, 406, 407):

"We think the facts that the machines are removable without injury to the property, and that the patterns, jigs and dies were made solely for the purpose of manufacturing patented machinery and the patents are owned and controlled by the printing company, if admitted, do not take them out from under the lien of the mortgage in view of the rules which have been laid down by us in a number of cases and which accordingly have become rules of property. What was written by Chief Justice Gibson in Voorhis v. Freeman, 2 W. & S. 116, continues to be the law in this great industrial State. Speaking for the court, he said (pages 118-19): * * * nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or mill, merely because it might be unscrewed or unstrapped, taken to pieces and removed without injury to the building. * * * Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.' The doctrine laid down in that case was re-
131 affirmed at the very next term of the court in Pyle v. Pennock, 2 W. & S. 390, and has received its latest confirmation in Titus v. Poland Coal Co., 275 Pa. 431, where we said, speaking through Mr. Justice Walling (page 436): 'The Pennsylvania rule is that a chattel placed in an industrial establishment for permanent use, and necessary to the operation of the plant, becomes a fixture and as such a part of the real estate, although not physically attached thereto; in other words, if the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a party of the realty. * * * Whatever is a necessary part of the machinery for carrying on the business is a fixture irrespective of the manner or its attachment.' Appellants concede that, if a mortgage is placed on an industrial plant, the personal property, such as machinery which is necessary to carry on the business of the plant will be subject to the lien of the mortgage, but they argue that, to have this effect, the machinery must be specifically mortgaged. We think such a principle cannot be deduced from our decisions. Cases from other states, such as Hubbell v. East Cambridge Savings Bank, 132 Mass. 437, much relied on by appellants, have no bearing on the controversy. We have established a legal rule of our own, necessary, as we view it, to the safety of investments."

132 Again, in the Roos case, above cited, the Court said (334 Pa. 305, 308, 309):

"Due to the demands and requirements of our changing economic order, we early developed in this State the principle of an 'industrial mortgage' which included, as part of the freehold, personal property in and about a manufactory. This principle became more important as our industrial life expanded, so that the necessary credits to sustain and finance manufactories and other like industries could be obtained with some decree of certainty that the security offered would be continued. Therefore, it was held that where premises were used in manufacturing or a similar industry, the real estate and personal property necessary to the plant as a going concern were subject to the lien of an industrial mortgage. This opened the way for persons interested in such industries to assure investors in a manufactory not only of a stable security for money loaned on the plant, but one that could not be broken down and destroyed by selling it piecemeal."

It seems to us that these cases, and others of like effect, clearly establish that the Pennsylvania rule under consideration is not a narrow and erratic rule adopted in connection with the subject of taxation, but is a broad rule of property, as stated by Justice Schaffer in the foregoing quotation. It is a long established and essential principle of the Pennsylvania system of law. The Pennsylvania tax system has accepted and applied it for one hundred years. It is recognized in other jurisdictions as well. We think that the rule must be considered in this broad significance in connection with an interpretation of the Act of Congress above referred to.

133

The Act of Congress is copied, in so far as it concerns the present case, in our Finding No. 14. It will be observed that in the first part of the statute as quoted it exempts from state and local taxation the notes, debentures, bonds or other obligations issued by Defense Plant Corporation, and also the corporation itself, including its franchise, its capital, reserve, surplus and income. This exemption is immediately followed by the exception, which reads as follows: "except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." It seems that the statute may have been suggested by a doubt as to whether the property of such an agency is generally subject to state and local taxation. With reference to its personal property, the question is set at rest by the portion of the statute just referred to. It is equally clear that the real property of the governmental agency is permitted to remain subject to such state and local taxation.

The vital question in connection with the present case is what is intended by the Act of Congress by its reference to real prop-

erty. It is contended by counsel for Defense Plant Cor-
134 poration that the term must be given a general meaning which will not include machinery placed in industrial plants of various characters, such as that which is sought to be taxed in this case. On the other hand, it is the contention of the Board of Tax Revision, composed of the Beaver County Commissioners, that in construing the Act of Congress the term real estate must be given its meaning under the Pennsylvania statutes and decisions hereinbefore discussed. The general Attitude of the Courts of the United States to the laws of Particular states was early defined in section 34 of the Federal Judiciary Act of September 24, 1789, c. 20 (28 U. S. C. A. 275), which reads as follows:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The policy of the Federal Courts with reference to the adoption of the law of the several states in their decisions, is illustrated by a great many cases. We call attention to a few of them which seem to us of most significance with reference to the particular question we have before us:

In the case of Edward Hines Yellow Pines Trustees v. Martin, 268 U. S. 458, 45 S. C. R. 543, the question presented was that of the title to certain real estate in the State of Mississippi. The Supreme Court of the United States accepted the general
135 rules as to real estate of the State of Mississippi. In the course of the opinion by Mr. Justice Stone, the Court said:

"An answer to these questions involved an interpretation of the state statute and the application of it, as interpreted, as a rule of property determinative of rights in titles to land within the state. Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the state courts."

* * * * * *

When questions affected by the interpretation of a state statute or a local rule of property arise in a federal court, that court has the same authority and duty to decide them as it has to decide any other questions which arise in a cause, and where state decisions are in conflict or do not clearly establish what the local law is, the federal court may exercise an independent judgment and determine the law of the case. * * * But where the

rule is one affecting title to real estate within the state and has been repeatedly determined by decisions of state courts so that it is established as the law of the state, there has been no departure from the rule that the federal courts will follow the de-
136 cisions of the state courts * * * To avoid the uncertainty and injustice which result from the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right' (Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858), this court has not hesitated, when there has been a conflict of decision between it and the state courts affecting a rule of property within the state, to overrule its own decisions and to follow the state decisions once it has become evident that they have established a 'rule of property' as the settled law of the state."

In the case of W. T. Waggoner Estate, 273 U. S. 113; 47 S. C. R. 271, the question arose out of the taxation of certain oil interests in Wichita County, Texas. The immediate question was whether the interests should be held to be real estate or personal estate. The Court said, in the course of its opinion:

"Whether realty or personality is a question of local law upon which the local decisions and statutes control. Edward Hines, Trustees v. Martin, 268 U. S. 458, 462, 45 S. Ct. 543, 69 L. Ed. 1050. Under article 7510, Complete Tex. Stat. 1920, all real estate is taxable in the county where located."

In the case of Kuhn v. Fairmont Coal Co., 215 U. S. 349; 54 Law. Ed. 228, the subject matter in controversy was
137 certain rights growing out of the ownership of real estate in the State of West Virginia. The immediate question was that of the right of the surface owner to the support of his surface as against the owner of underlying minerals upon the removal thereof. It seems that the law of the State of West Virginia had been determined in a decision rendered by its Appellate Court subsequent to the contract and alleged breach thereof which were the basis of the action. The Supreme Court of the United States undertook to decide the questions involved without being controlled by the decision of the State Court. The ground for its action, as stated, was that while there was a decision of the State court, it was so recent that it could not be said a rule of property had been established in the State at the time of the entering into said contract and the alleged breach thereof. In discussing the question involved the Supreme Court, in the opinion by Justice Harlan, said, among other things:

"In Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974, Mr. Justice Miller, speaking for the court observed: 'it may be said generally that wherever the decisions of the state courts relate to some law of a local character, which

may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive and always entitled to the highest
138 respect of the Federal court. The whole of this subject has recently been very ably reviewed in the case of Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes also the law governing the courts of the United States sitting in that state.' See also Jackson ex dem St. John v. Chew, 12 Wheat. 153, 6 L. ed. 583.

"Up to the present time these principles have not been modified or disregarded by this court. On the contrary, they have been reaffirmed without substantial qualification in many subsequent cases, some of which are here cited."

* * * * * *

"We take it, then, that it is no longer to be questioned that the Federal courts, in determining cases before them, are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the Federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. 2. Where, before the rights of the parties accrued, certain rules relating to real estates have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal court as au-
139 thoritative declarations of the law of the state. 3. But where the law of the state has not been thus settled, it is not only the right, but the duty, of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the state court if the question is balanced with doubt."

One of the most significant cases relating to this question is the comparatively recent case of Erie Railroad v. Tompkins, 304 U. S. 64; 58 S. C. R. 817. This case arose out of the per-

sonal injuries sustained by Tompkins by the alleged negligence of the Railroad Company. The accident happened in Pennsylvania. It seems that he was walking along a beaten footpath which ran for a short distance alongside the tracks of the railroad; and while so walking was struck by some-
140 thing which looked like a door projecting from one of the moving cars. The action was brought in the Federal Court for the Southern District of New York. The Railroad Company contended that the case should be tried in accordance with the Pennsylvania rule; that the duty which it owed to the plaintiff was only that owed to a tresspasser. The trial court rejected this position, and the case reached the Supreme Court of the United States on appeal. This Court reversed the trial court, holding that the Pennsylvania rule should have been applied. The opinion of the Supreme Court was by Justice Brandies, and is instructive in its review of the Federal decisions relating to the adoption of state rules of law by the Federal Courts. The earlier case of Swift v. Tyson was reversed. Justice Brandies quotes the following language of Mr. Justice Story in the earlier case:

"'the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovaable and intra territorial in their nature and character.'"

Further discussing the question, Justice Brandies said:

"But it was the more recent research of a competent
141 scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written."

Justice Brandies further states the rule at this time adopted by the Supreme Court of the United States as follows:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has not power to declare substantive rules of common law applicable in a state whether

they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In this connection he quotes, with approval, from the dissenting opinion of Justice Holmes in the case of Kuhn v. Fairmont Coal Company, above referred to, as follows:

142 "The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':

"'But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *

"'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'"

It is true that the Tompkins case was an action of trespass to recover for injuries sustained and alleged to have been caused by the negligence of the defendant railroad. Indirectly, however, the question passed upon may be said to have the

143 aspect of dealing with a rule of real property, namely, the relation of one walking upon the right of way of a railroad company to that company as a trespasser, or otherwise.

In the case of Dayton & Michigan Railroad Co. v. Commissioner of Internal Revenue, 112 Fed. (2d) 627, the question involved is thus stated in the first paragraph of the opinion:

"This is a petition to review a decision of the Board of Tax Appeals. The sole question involved is whether payments of guaranteed dividends on preferred stock of petitioner are deductible as interest paid on indebtedness within the meaning of Sec. 23 (b) of the Revenue Act of 1934, 48 Stat. 680, 26 U. S. C. A. Int. Rev. Code, Sec. 23 (b). These guaranteed dividends were paid by the Baltimore and Ohio Railroad Company, as assignee of the lessee of the properties of petitioner, direct to the stockholders. There is no question but that such payments constituted income to the petitioner, the question being whether, as they were made in discharge of an obligation of petitioner, petitioner was entitled to a deduction in the amount of the payments

on the theory that they constituted in reality interest on an indebtedness and not dividends on stock."

In this case it was held that the Federal Court should follow, in determining the question involved, the decisions of the
144 appellate court of the State of Ohio. In the opinion of the Circuit Court, by Parker, the law is thus stated:

"It is argued for the petitioner that the Supreme Court of Ohio did not correctly construe the act of 1870 or correctly determine the rights of preferred stockholders under the mortgage executed pursuant thereto. It was well settled, however, even before Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, that decisions of the highest court of a state as to the interpretation to be placed upon one of its statutes were binding upon the federal courts. 14 A. J. 313; Lindsey v. Washington, 301 U. S. 397, 400, 57 S. Ct. 797, 81 L. Ed. 1182; Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109, 113, 57 S. Ct. 345, 81 L. Ed. 540. And it was equally well settled that we were bound by state decisions as to rights of property and other matters of local law. Tyler v. United States, 281 U. S. 497, 501, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758; Warburton v. White, 176 U. S. 484, 496, 20 S. Ct. 404, 44 L. Ed. 553. Since the decision in Erie R. Co. v. Tompkins, supra, there can be no question whatever as to our duty to accept the decision of the Ohio court as determinative of the rights of the parties under contracts made, stock issued and mortgages executed within that state. It is true that in interpreting the meaning of a federal statute we are not
145 bound by state decisions; but where rights under state laws become material to the application of federal statutes, we look to the decisions of the states where those rights arise to determine what they are. As said by this court in Leser v. Burnet, 4 Cir., 46 F. 2d 656, 760; "While we look to the federal decisions, and in the absence of such decisions, to the general law, in interpreting the act of Congress, we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that state and relating to property there situate.'"

Numerous other cases might be cited and discussed, but we are satisfied that those already referred to sufficiently establish the rule of law which we think is applicable in the present case. We think there is no question that Congress could, by statute, exempt from state and local taxation all the property, real and personal, of such a federal agency as the Defense Plant Corporation. As a matter of fact, it did not undertake to do this. It left subject to such taxation the real estate of such corporation; and, therefore, left for determination the question as to what is

embraced within said term real estate. The statute does not attempt any specific definition of real estate. The question is necessarily left for determination by the courts; and the question is as to where the true and applicable definition
146 is to be found. We are satisfied that it must be found in the law of the state in which the Federal statute is sought to be applied.

It is true that in most of the cases we have considered, and in most of those decided, the question has been as to the course to be followed by the Federal court in interpreting state statutes and state decisions. In the present case we are undertaking to interpret a Federal statute. As suggested in the last case above quoted, the question is not merely that of an interpretation of the Federal statute generally, but of its interpretation and application to a state of facts and law existing within the State of Pennsylvania. This, we are satisfied, involves a question of purely local law. Nothing has a more definite or inescapable local habitation than real estate. With reference to real estate and the taxation thereof there are rules of property established in Pennsylvania by decision and statute for over one hundred years. These have become rules of property.

It was argued by counsel for the Defense Plant Corporation that Congress showed an intention not to be bound by local statutes or decisions as to real estate by reason of the following language at the close of the quotation hereinbefore made from the Act of Congress, "but such exemptions shall not be construed to be applicable in any state to any buildings which are considered by the laws of such State to be personal property for taxation purposes." The argument does not, however, seem
147 to us to be persuasive. It seems to us that Congress, rather, says, "In this one respect we modify the law of certain states as to what constitutes real estate, but in all other respects we leave it unchanged."

It was also argued that to permit the law of the state to determine the character of the property taxed, as to whether real or personal, would prevent uniformity in the application of the Federal legislation. It is to be observed, however, that the Federal enterprises carried on by the Federal agencies, such as Defense Plant Corporation, are necessarily more or less temporary in character. They are undertaken to meet the emergencies raised by the state of war. It is reasonable to assume that to a large extent they will be discontinued upon the termination of the emergency. On the other hand, in the states, or at least many of them, rules of property are not only of long standing, but have come to regulate the ordinary and essential affairs of the citizens. They are of constant application. In the absence

of any urgent necessity for setting aside laws of the state, we think it sound policy to continue to treat those rules as the basis of decision not only by the state, but by the Federal courts. The contrary policy would probably deserve the criticism which Mr. Justice Brandies, in the Tompkins case, passed upon the policy established by the early case of Swift v. Tyson, and succeeding decisions, namely, that "In attempting to promote uni-
148 formity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state."

Our conclusion is, that when the Act of Congress refers to real estate owned by such governmental agencies as Defense Plant Corporation as subject to state and local taxation, it means real estate within the definition of the law of the state in which the statute is sought to be applied; in other words, in the instant case, the law of the State of Pennsylvania.

There is nothing in the record in the present case to indicate that the taxes in question constitute, or will constitute an undue burden upon the Federal Government, or will in any way obstruct, or impair the performance of its constitutional functions. We think, therefore, that the rule stated should be applied in this case.

Order

Now, to wit: June 7, 1944, it is hereby ordered, adjudged and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assessment of said land as made by the assessor and confirmed by the County Commissioners of Beaver County, acting as a Board of Tax Revision in and for said County, be and the same hereby
149 is approved; the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court:

FRANK E. READER, *P. J.*

Same day, an exception is granted and bill sealed to Defense Plant Corporation.

[SEAL] FRANK E. READER, *P. J.*

In Court of Common Pleas of Beaver County

Order

Filed June 26, 1944

And now, June 26, 1944, it having been brought to the attention of the Court that a question has arisen if the order of June

7th heretofore entered was a final order in view of the fact that it was signed, Frank E. Reader, P. J., and it having been the intention of the Court that the order of June 7th be the final order, on motion of Reed and Ewing, Attorneys for Defense Plant Corporation, the order of Judge Reader of June 7th, as follows:

"ORDER.

"Now, to wit: June 7, 1944, it is hereby ordered, adjudged and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assess-
150 ment of said land as made by the assessor and confirmed by the County Commissioners of Beaver County, acting as a Board of Tax Revision in and for said County, be and the same is hereby approved; the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court:

FRANK E. READER, *P. J.*"

is reaffirmed as the order of the Court en banc.

FRANK E. READER, *P. J.*
HENRY H. WILSON, *Judge.*

Same day, an exception is granted and bill sealed to Defense Plant Corporation.

FRANK E. READER, [SEAL]
HENRY H. WILSON, *Judge.*

In Court of Common Pleas of Beaver County

General statement of questions to be argued on appeal, and, evidence to be omitted from record;

Filed July 22, 1944

The questions to be argued on the appeal from the decree of this Court filed in the Supreme Court of Pennsylvania, at No. 201, March Term, 1944, are substantially the following:

1. Under the provisions of the Reconstruction Finance Corporation Act relating to exemption from taxation, 15
151 U. S. C. A. Section 610 ... machinery and equipment of Defense Plant Corporation in its plant in Borough Township taxable as real estate by local taxing authorities?

2. Under the provisions of Section 610 of U. S. C. A. Title 15, does "real property" mean real property under the tax laws of the Commonwealth of Pennsylvania, or does it refer to real property as determined by the Federal law?

3. Can a State by statute make real property for tax purposes out of movable machinery and equipment which ordinarily is regarded as personal property?

Appellant proposes to print all of the Record in the Court below except as follows: (1) Pages 30 and 31; (2) Beginning on page 71, "Further Direct Examination", and extending to bottom of page 87; (3) Page 94, beginning in the middle of the page as follows: "THE COURT (Wilson, J.)" and extending to middle of page 99, the conclusion of the testimony.

Consent to the foregoing will be presumed unless objections are made within ten days from the filing of this statement.

HENRY J. CRAWFORD,
HAROLD F. REED,
Attorneys for Defense Plant Corporation.

152 In the Supreme Court of Pennsylvania
Western District

No. 201 March Term, 1944

Docket entries

IN RE: APPEAL OF DEFENSE PLANT CORPORATION FROM ASSESSMENT OF PROPERTY IN THE TOWNSHIP OF BOROUGH, COUNTY OF BEAVER, PENNSYLVANIA

Appeal of Defense Plant Corporation

Appeal From the Order of the Court of Common Pleas of Beaver County at No. 320 June Term, 1943

June 27, 1944, Appeal and Affidavit Filed and Writ Exit

July 3, 1944, Appearance for appellee filed.
September 14, 1944, Assignments filed.
September 21, 1944, Appellant's acceptance of service of brief for County of Allegheny filed under Rule 61.
September 21, 1944, Appellee's acceptance of service of Brief for County of Allegheny filed under Rule 61.
September 25, 1944, Record with testimony attached filed.
September 27, 1944, Argued. 218.
September 28, 1944, the following order filed: Order.
Per Curiam:
September 28, 1944, It is ordered that the above-entitled case shall be reargued before the entire Court on Monday, October 2, 1944. Maxey, C. J.

October 2, 1944, Reargued. 218. Decision.
October 31, 1944. Order affirmed. Linn, J.
November 9, 1944, Petition for reargument filed. Order. Nov. 17, 44.

Per Curiam:
Petition refused.

153 November 17, 1944, Court directed orally that record be held for three months in order that counsel may apply at Washington.

January 26, 1945, Petition for allowance of appeal to the Supreme Court of the United States; Assignments of error; Statement as to Jurisdiction; Acceptance of service, filed.

ORDER ALLOWING APPEAL

Defense Plant Corporation, Appellant in the above-entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the Commonwealth of Pennsylvania on the 31st day of October 1944, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the Statutes and the Rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the Commonwealth of Pennsylvania in the above entitled cause, as provided by law, and that the Clerk of the Supreme Court of the Commonwealth of Pennsylvania shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

It appearing that Appellant is a corporate agency of the United States, its stock being wholly owned, directly or indirectly by the United States, no bond or other security for the prosecution of such appeal or to answer in damages or costs shall be required of Appellant:

GEORGE W. MAXEY,
Chief Justice of the Supreme Court.

Dated Feb. 2, 1945. Court of Pennsylvania.

February 9, 1945, Acceptance of service of copies of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction dated Feb. 6, 1945, filed.

February 9, 1945, Citation of Chief Justice of Supreme Court of Pennsylvania with acceptance of service, filed.

154 February 15, 1945, Statement of points relied upon and designation of portions of the record necessary for consideration thereof, with acceptance of service, filed.

February 19, 1945, Stipulation designating parts of record to be included in the transcript on appeal to Supreme Court of United States, filed.

February 19, 1945, Appellee's statement addressed to the Supreme Court of the United States opposing jurisdiction, and motion to dismiss or affirm, with acceptance of service, filed.

February 19, 1945, Original citation with acceptance of service, authenticated transcript of record and statement of points relied upon delivered to Harold F. Reed, Esq., of counsel for appellant, for transmission to the Supreme Court of the United States.

For Appellant: Sterling Newell, Henry J. Crawford, Harold F. Reed.

For Appellee: John G. Marshall, County Solicitor of Beaver County.

155 In the Supreme Court of Pennsylvania,
Western District

No. 201 March Term, 1944

IN RE: APPEAL OF DEFENSE PLANT CORPORATION FROM ASSESSMENT OF PROPERTY IN THE TOWNSHIP OF BOROUGH, COUNTY OF BEAVER, PENNSYLVANIA

Appeal of Defense Plant Corp.

Assignments of error

Filed Sept. 14, 1944

Defense Plant Corporation, the Appellant in the above case, files the following Assignments of Error:

1. The lower Court erred in entering the following order, which order and the exception thereto are as follows:

"ORDER

"Now to wit June 7, 1944, it is hereby ordered, adjudged, and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assessment of said land as made by the assessor and affirmed by the County

Commissioners of Beaver County, acting as a Board of Tax Revision in and for said County, be and the same is hereby approved; the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court.

FRANK E. READER, *P. J.*"

"Same day, an exception is granted and bill sealed to Defense Plant Corporation.

FRANK E. READER, *P. J.* [SEAL]"

2. The lower Court erred in entering the following order, which order and the exception thereto are as follows:

"ORDER.

Filed June 26, 1944

"And now June 26, 1944, it having been brought to the attention of the Court that a question has arisen if the order of June 7th heretofore entered was a final order in view of the fact that it was signed, Frank E. Reader, P. J., and it having been the intention of the Court that the order of June 7th be the final order, on motion of Reed & Ewing, Attorneys for Defense Plant Corporation, the order of Judge Reader of June 7th as follows:

"'Now to wit June 7, 1944, it is hereby ordered,
156 adjudged, and decreed that the appeal of Defense Plant Corporation from the assessment set forth in the findings of fact hereinbefore stated be and the same hereby is dismissed; and that the assessment of said land as made by the assessor and affirmed by the County Commissioners of Beaver County, acting as a Board of Tax Revision in and for said County, be and the same is hereby approved, the costs of this proceeding to be paid by Defense Plant Corporation.

By the Court.

FRANK E. READER, *P. J.*

is reaffirmed as the order of the Court en banc.

FRANK E. READER, *P. J.*
HENRY H. WILSON, *Judge.*"

"Same day, an exception is granted and bill sealed to Defense Plant Corporation.

FRANK E. READER, [SEAL].
HENRY H. WILSON, *Judge.*"

HENRY J. CRAWFORD,
HAROLD F. REED,
Attorneys for Defense Plant Corporation.

[File endorsement omitted.]

157 In the Supreme Court of Pennsylvania
Western District

No. 201—March Term, 1944

IN RE: APPEAL OF DEFENSE PLANT CORPORATION FROM ASSESSMENT OF PROPERTY IN THE TOWNSHIP OF BOROUGH, COUNTY OF BEAVER, PENNSYLVANIA

Appeal of Defense Plant Corporation

Appeal From the Order of the Court of Common Pleas of Beaver County at No. 320 June Term, 1943

Opinion of the Court

Filed Oct. 31, 1944

LINN, *J.*

The question is, what did Congress mean by the term "real property" in the Act waiving immunity from taxation of certain property owned by government agencies? It is presented by this appeal from the confirmation of a township tax assessment for the triennial period 1942–45. Appellant, Defense Plant Corporation, originally complained of the entire assessment, which itemized land, buildings and machinery; but at the hearing in the court below conceded the power to tax the land and buildings and denied only the power to tax the machinery.[1]

The parties have agreed that the plant-machinery was "necessary and essential to its [appellant's plant's] existence and operation as a manufacturing plant for aircraft propellers."
158 It was held taxable as real estate pursuant to the General County Assessment Law of May 22, 1933, P. L. 853, 72 PS section 5020-101, providing: "Section 201. Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate:

"(a) All real estate to wit; Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces,

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[1] The assessment was itemized:

Nine (9) Acres improved, assessed at $100 per acre	$9,900.00
Twenty four (24) acres, not improved, assessed at $1000 per acre	24,000.00
Plant building and cafeteria assessed at	338,000.00
Administration Building, assessed at	32,000.00
Boiler House, assessed at	60,000.00
Personnel Building, assessed at	5,000.00
Machinery, assessed at	388,000.00
Total	856,900.00

forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

It has long been the rule in Pennsylvania that "Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a *manufactory at* all, must pass for a part of the freehold" (Voorhis v. Freeman,[2] 2 W. & S. 116, 119 (1841)). This rule prevails in the majority of the states in which the subject has been considered by the courts, as the cases cited later, show. Appellant's machinery, being an integrated part of the manufactory, and so, of the freehold, was therefore taxable, as other real property in the township was taxable unless the Congressional immunity did not apply.

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The Act[3] provides: "Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except as provided in section 742a (a) of Title 31. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence, with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, (2) the RFC Mortgage Company, the Federal National

[2] See also, Patterson v. Delaware Company, 70 Pa. 381; Titus v. Boland Coal Company, 275 Pa. 421, 119 A. 540; Commonwealth Trust Company of Pittsburgh v. Harkins, 312 Pa. 402, 167 A. 278; Pennsylvania Chocolate Company v. Hershey Brothers, 316 Pa. 292, 175 A. 694; Central Lithograph Company v. Eatmor Chocolate Co., 316 Pa. 390, 175 A. 697; Ross v. Fairy Silk Mills, 334 Pa. 305, 5 A. 2d 569; McClure v. Atlantic Rock Company, Inc., 339 Pa. 296, 14 A. 2d 124.

[3] Approved June 10, 1941, c. 190, sec. 3, 55 Stat. 248, 15 USCA section 610, amending Act of January 22, 1932, c. 8, sec. 10, 47 Stat. 9.

Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan
160 Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

Our special concern is with the provisions "* * * except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed * * *. Such exemptions shall also be construed to be applicable to * * * personal property owned by * * * [Defense Plant Corporation] * * * but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

What did Congress intend by the term "real property" in the statute which was designed to waive immunity in aid of the revenues of local communities in which industrial establishments were engaged in manufacturing defense material? Did it intend "real property" to include the entire "mill or manufactory" (as provided by local law) or only the land and vacant buildings without the mechanical part of the plant?

Two suggestions are made by the parties for determining the intended content of the term real property. The appellant says: "We submit that the primary, universally accepted meaning of 'real property' is, as indicated in the foregoing quotations,[4]
161 land together with such tangible items, generally chattel in nature, as have by intention of the interested parties and by their permanent manner of attachment to the land become incorporated into the land, that is, buildings and fixtures."

We think there is such ambiguity and uncertainty in that statement, that we must reject it on the ground that it does not represent the majority view. Our examination of the decisions dealing with the actual and constructive attachment of machinery to the freehold throughout the states, shows that in a major-

[4] The quotations are from 1 Tiffany, Real Property (3d ed. 1939), sections 3 and 10; 52 C. J. p. 1156; In re Inglis, 69 Okla. 64, 169 Pac. 1083.

162 ity[5] of the states, the attachment to the land may be construc-
tive[6] and need not be physical to the extent that removal will result in serious damage to the remaining freehold. In Ohio, for example, only "slight"[7] attachment is required. The evidence in the record shows that some of the machinery in appellant's plant is easily removable; some is bolted to foundations; "hoists, the monorail, or crane runway" appear to be built in and supported by the structural part of the building. For some states, no decisions were found. In some states, statutes provide that certain classes of machinery shall be assessed as real property.[8]

On the other hand, the appellee submits that, in abolishing immunity and conferring the local power of taxation, Congress must have intended the content of the term real property to be determined by the law of the taxing district. In the condemnation proceeding, U. S. ex rel. T. V. A. v. Powelson, 319 U. S. 266, 63 Sup. Ct. 1047, 1054, the court said at page 279, "Though the meaning of 'property' as used in § 25 of the Act and in the Fifth
Amendment is a federal question, it will normally obtain
163 its content by reference to the local law." The rule was applied in U. S. v. Bechtold Co., 129 F. 2d 473 (C. C. A. 8th, 1942) and in U. S. v. 19.86 Acres of Land, 141 F. 2d 344 (C. C. A. 7th, 1944), similar cases being referred to in the opinions.

Against the adoption of the local definition of real estate, the appellant refers to several cases: Carpenter v. Shaw, 280 U. S. 363, 50 Sup. Ct. 121; Lyeth v. Hoey, Collector, 305 U. S. 188, 59 Sup. Ct. 155; and Morgan v. Commissioner, 309 U. S. 78, 60

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[5] The majority referred to includes the following: Humes v. Higman, 145 Ala. 215, 40 So. 128; Southern Cotton Oil Co. v. Lowery, 231 Ala. 119, 163 So. 629; Fechet v. Drake, 2 Ariz. 230, 12 Pac. 694; Teater v. Good Hope Development Corp., 86 P. 2d 673 (Cal.); Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744; Atlantic Refining Co. v. Feinberg, 31 Del. 183, 112 A. 685; Commercial Fin. Co. v. Brooksville Hotel Co., 98 Fla. 419, 123 So. 814; Seedhouse v. Broward, 34 Fla. 509, 16 So. 325; Cunningham v. Cureton, 96 Geo. 489, 23 S. E. 420; J. & H. Day Co. v. Public Sav. Ins. Co., 85 Ind. App. 78, 151 N. E. 361; Ottumwa Woolen Mills Co. v. Hawley, 44 Iowa 57; Green v. Chicago, R. I. & P. R. R., 8 Kan. 617; Parsons v. Copeland, 38 Me. 537; Dudley v. Hurst, 67 Md. 44, 8 A. 901; Anderson v. Perpetual B. & L. Ass'n, 190 A. 747 (Maryland); Southbridge Sav. Bank v. Mason, 167 Mass. 500, 18 N. E. 406; Commercial Credit Corp. v. Com'th Mtge. etc., 276 Mass. 335; Lyle v. Pain, 42 Mich. 314, 3 N. W. 921; Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 247 N. W. 76; Merchants National Bank v. Stanton, 55 Minn. 211, 218; Planters Mfg. Co. v. Greenwood Agency, 168 Miss. 892, 152 So. 476; Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. 305, 58 A. 409; McRea v. Central Nat. Bk., 66 N. Y. 489; Foote v. Gooch, 96 N. C. 265, 1 S. E. 525; Metropolitan Life Ins. Co. v. Kimball, 94 P. 2d 1101 (Oregon); Pennsylvania cases are cited above; Metropolitan Life Ins. Co. v. Jensen, 9 N. W. 2d. 140 (South Dakota); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S. E. 2d 345; Pocahontas Coal & Coke Co. v. By Products Pocahontas Co., 112 W. Va. 390, 164 S. E. 504; Thomsen, v. Carlen, 196 Wis. 581, 219 N. W. 439.

[6] An interesting discussion of this subject by the Court of Appeal appears in Tyne Boiler Works Co. v. Overseers, L. R. 18 C. B. D. 81 (1887).

[7] Holland Furnace Co. v. Trumbull Sav. & Loan Co., 135 Ohio St. 48, 52 (1939). In this case the court said: "While, to make a chattel a fixture, there must be physical annexation of the chattel to the realty, the annexation may be very slight. * * *"

[8] Vermont, Pub. L. (1933) sec. 586; Utah, Code Ann. (1943) 80-3-1; Kansas, Gen. Stat. (Corrick 1935) sec. 79-102; Rhode Island, Gen. Laws (1938) c. 30, section 3.

Sup. Ct. 424. In the Carpenter case it was necessary to determine what Congress meant by the word "lands" in the Act ratifying the Atoka Agreement with certain Indian tribes then in Oklahoma Territory. The Act provided "* * * the lands allotted shall be non-taxable while the title remains in the original allottees." The question was whether oil royalty reserved by allottee-lessors was exempt or was taxable as personal property by the State of Oklahoma and the royalty was held nontaxable. The Lyeth and the Morgan cases involved the construction of the Federal Revenue Act, in one case the meaning of the word "inheritance" and in the other, the meaning of the term "general power of appointment." It was held that national uniformity in the collection of income and inheritance taxes required the application of the generally understood meaning of "inheritance" and of "general power of appointment," unaffected by local variations from the generally understood meaning of the words. National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, determining what Congress meant by the word "employes" in the Wagner Act, was also referred to. It was held that as the Act was "administered by a national agency, intended to solve a national problem on a national scale," local definitions of the word must be rejected. Those cases, and others which might be added, illustrate the application of the principle of federal supremacy, a principle not challenged by the appellee. Its submission is that when Congress conferred the power of "local taxation [of real property] to the same extent according to its value as other real property is taxed" without defin-
164 ing real property in the Act, it necessarily intended that all the property within the taxing district considered to be real property, should be taxable; that if this construction were rejected, the machinery constituting part of appellant's plan would be exempt while like machinery of a private individual would be taxed; that one purpose of the Act was to remove such discrimination as had formerly existed, in order that tax burdens might be more equitably distributed.

The brief filed on behalf of Allegheny County states that "The amending Act of 1941 originated in the Senate as S. 1438 of the 77th Congress, 1st Session. Section 3 of the bill amends section 10 of the original Act. In commenting on the existing law (i. e., the provisions of Section 10 of the original Act), the report of the Committee on Banking and Currency (S. Rep. No. 292), submitted through Senator Brown, contains the following relevant sentence: 'The only qualification of these exemptions provides that real property of the Corporation is to be subject to nondiscriminatory State and local taxes.'" In the brief of the appellant it is said that Pennsylvania furnishes an "example of

tax diversity." Different taxing districts may have different rates of assessment or none at all; such diversity is not prohibited; what the law prohibits is discrimination within the boundaries of the taxing district. The Constitution of Pennsylvania allows classifications of municipalities, counties, townships, etc., and classification has been made pursuant to that power. For cities of the first class, for example, the law provides that in the "* * * assessment of real estate for taxation, the machinery and tools used in manufacturing in any mill or manufactory shall not be considered or included in determining the value of real estate." Act of June 3, 1915, P. L. 787, 53 PS section 4742. In cities of the second class such property is not taxable for city or school purposes: Act of March 7, 1901, P. L. 20, Art. XIX, section 3, cl. 1, amended by the Act of May 12, 1911, P. L. 287, section 1, 53 PS section 9634. But the mere fact that in some taxing districts certain property is taxable and in others
165 is exempt, is of no consequence in this review because appellant does not contend that there was discrimination against its property in the taxing township. For the same reason it would seem to be immaterial if in some states it may be found unnecessary to raise revenue by taxing such property.

There is difficulty in ascertaining with certainty what Congress meant by the words real property in the statute. There is no federal general common law [9] to which we can turn for aid. In 36 Words and Phrases, p. 221, many varying definitions of real property are given. Dictionaries define it as land, real estate, realty, and the like. Any adequate definition must take account of the doctrines of fixtures and of equitable conversion. We understand appellant's position to be that Congress intended that the content of the term real property should be the view prevailing in the majority of the states that have dealt with the subject of chattels made part of the freehold. The cases cited above in note 5 show that the majority view is contrary to that suggested as the standard. If appellant is correct in suggesting that the Congressional meaning is to be found in the prevailing view among the states, we must hold that the machinery was properly included in the assessment of real estate and entitled to the waiver of federal immunity. If, on the other hand, we accept the appellee's submission that Congress intended that the content of the term real property should be found in the law of the assessing district, the machinery was properly included in the assessment. In either view, we all agree the appeal fails.

Order affirmed.

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[9] Erie R. Co. v. Tompkins, 304 U. S. 64, 78, 58 Sup. Ct. 817, 822.

166 In Supreme Court of Pennsylvania

Appellant's petition for reargument

Filed Nov. 9, 1944

Defense Plant Corporation, appellant herein, respectfully prays this Honorable Court to grant a reargument in the above appeal, to reconsider the conclusions reached in its opinion filed October 31, 1944, and reverse that decision, and specify herein the points overlooked or misapprehended by the Court, the reason for rehearing and the argument in favor thereof. Your petitioner desires a reargument on the following points:

1. Where the Act of Congress of June 10, 1941, U. S. C., Title 15, Section 610, provides that personal property of Defense Plant Corporation is exempt from local taxation, but that real property may be taxed to the same extent that other real property is taxed, may a State, by considering machinery and other purely personal items, used in the operation of a plant, as real property for local tax purposes, nullify the immunity of personal property?

2. Whether, if the Pennsylvania Act of May 22, 1933, P. L. 853, Section 201, 72 Purd. Stat. 502-201, authorizes the assessment of machinery and other personal items belonging to Defense Plant Corporation, an agency of the United States of America, whose personal property has been declared immune from local taxation by the Act of Congress of June 10, 1941 U. S. C., Title 15, Section 610, it is invalid as being repugnant to the Constitution and Laws of the United States.

REASONS FOR REHEARING

1. The basis of this Court's decision is:

(a) That it is uncertain what Congress intended by the meaning of the words "real property" and that as a majority of the States consider a slight annexation of machinery to the freehold to constitute real property, that the machinery and other personal items of Defense Plant Corporation in the plant in Borough Township, for the purposes of taxation in Pennsylvania became real estate.

(b) The concept that the content of the term "real property" as used in the Federal Statute should be found in the law of the assessing district.

2. This Court's opinion is based on a ground that was not briefed or argued orally, namely that in the majority of the States; machinery whether fast or lose, is a part of the real
167 estate when located in a manufactory. Appellant believes that such is not the law in the majority of the States.

3. In reaching its decision this Court gave no consideration to what was intended by Congress in specifically preserving the immunity of personal property from taxation.

4. This Court misapprehended the nature and status of Defense Plant Corporation, and erroneously differentiated it from agencies administered on a national basis.

5. This Court gave no consideration to the discrimination resulting between the several states, holding that the local Pennsylvania rule of taxation should govern the intent of Congress nor to the need for uniformity throughout the United States in interpreting the Act of Congress, although the Act is national in scope, and is administered by a national agency in the most vital national interest.

ARGUMENT

1. The Act of Congress of June 16, 1941, c. 190, sec. 2, 55 Stat. 248, 15 U. S. C., Sec. 610, provides in part as follows:

"* * * The corporation, including its franchise, its capital, reserves, and surplus; and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence, with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, * * *. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in Clause (1), (2), or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered 168 by the laws of such State to be personal property for taxation purposes."

The Court based its decision in part on the ground that machinery of Defense Plant Corporation constituted a fixture under the law of Pennsylvania. This is contrary both to the testimony in the case (R-62a-68a, 71a-75a) and the Trial Court's Finding of Fact (R-110a). The facts as found by the lower Court show that no question of fixtures was involved in this case. In order to constitute a fixture, there must be some annexation to real estate and the parties must intend that the chattels shall be

come part of the real estate. In this case, Curtiss-Wright Corporation and Defense Plant Corporation expressly agreed that machinery shall remain personalty, notwithstanding the fact that it may be affixed or attached to the realty. (R. 27a.) That there was no sufficient annexation is clearly shown in Appellant's Brief, p. 37.

Time has not permitted the examination of all of the cases cited by this Court as authority that the Pennsylvania rule is applied in a majority of the States. However, it is submitted that by statute or decision in the vast majority of states, machinery of the type in question is not taxable as real property. Ohio, for example, is one of the states mentioned. Yet it clearly appears in that state that such property is no part of the real estate. Indeed, the Ohio State Board of Tax Appeals has recently ruled that rolling mill equipment in a steel plant, weighing almost 2,000,000 pounds is not taxable as part of the real property (Republic Steel Corporation v. Board of Revision, No. 6226, decided June 23, 1944, appeal now pending in the Ohio Supreme Court)

This Court also refers to a "slight" attachment to real property, whereas the majority of the property here involved was not attached in any way (Record p. 63a). With respect to "the hoist, the monorail or crane runway" referred to by the Court (Opinion, p. 218–6) the testimony is that they were not considered machinery (Record p. 67a) and they were not included in the list of machinery assessed (Record, pp. 97a–101a).

2. This Court also based its decision on the ground that the meaning of the term "real property" should be determined by applying the law of the taxing district. It is submitted that there is nothing in the Federal Act or the surrounding
169 circumstances permitting such an interpretation. When Congress legislates, it is presumed to legislate nationally, and the Federal rule rather than any State rule obtains in the absence of a clear indication to the contrary in the Act (Jerome v. United States, 318 U. S. 101–4). That there is no such clear indication in Section 10 of the Reconstruction Finance Corporation Act is born out by this Court's statement in its opinion on page 218–9: "There is difficulty in ascertaining with certainty what Congress meant by the words 'real property' in the Statute."

As set forth in Appellant's brief, pages 15 to 22, an Act such as the Reconstruction Finance Corporation Act must be interpreted on a national basis and not on a local basis. The only thing local about the Act is its administration in a specific locality. There is nothing in the Act itself to indicate the subject matter is local. Both the extent and the subject matter of the immunity must be determined by the intent of Congress

when it used the words "real property" and "personal proper
Garret v. Moore-McCormick Co., 317 U. S. 239 (1942).

In construing the Act of Congress, words should be giv
their usual and ordinary meaning. (Federal Housing Admin
trator v. Burr, 309 U. S. 242-246). If the Courts are bound
adopt the local rule, then because of a peculiar and technical r
of law in force in this State and some other States, the proper
which is admittedly personal may be taxed as real estate, and t
provision of a Federal Act specifically exempting person
property from taxation completely nullified, as set forth on pa
32 of Appellant's brief:

"For if States by mere definition have the power to elimina
all distinctions between real and personal property belonging t
these corporations and thereby to tax all items of property
real property, then the Federal Constitution and the Act
Congress exempting personal property from State taxation b
come merely a shadow without meaning, and the States thereb
assume jurisdiction over property of the United States in defianc
of Congress and in contravention of the Constitution."

It is respectfully submitted that there is Federal Commo
Law which is applicable to the present cause. In the case o
D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.
170 315 U. S. 447-472, Justice Jackson said:

"Federal law is no juridical chameleon, changing com
plexion to match that of each state wherein lawsuits happen to
be commenced because of the accidents of service of process and
of the application of the venue statutes. It is found in the fed
eral Constitution, statutes, or common law. Federal common law
implements the federal Constitution and statutes, and is condi
tioned by them. Within these limits, federal courts are free to
apply the traditional common-law technique of decision and to
draw upon all the sources of the common law in cases such as
the present. (Board of Commissioners v. United States, 308
U. S. 343, 350)."

3. Apparently, this Court gave no consideration to that por
tion of the Act of Congress which specifically grants immunity
to personal property from taxation. If Congress intended to
permit any State to levy a tax upon personal property of De
fense Plant Corporation merely by calling such personal prop
erty real estate, would it have expressly declared that personal
property was immune from local taxation? In the past, Con
gress has frequently removed real estate from the tax exemption
granted to Federal Agencies, but only in this Act in question has
Congress specifically banned local taxation of personal property.
The intent of Congress in this respect is clearly shown in Ap
pellant's brief, pp. 24-31.

4. This Court in its opinion, misapprehended the nature and status of Defense Plant Corporation, and attempted to differentiate it from other agencies of the Federal Government administered on a national basis. In its opinion, the Court makes the following statements: "National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, determining what Congress meant by the word 'employees' in the Wagner Act, was also referred to. It was held that as the Act was 'administered by a national agency maintained to solve a national problem on a national scale,' legal definitions of a word must be rejected." Can anyone say that Defense Plant Corporation is not "a national agency maintained to solve a national problem on a national scale?" Obviously not. Defense Plant Corpora-
171 tion is operated as a nation-wide organization. It was created to carry out the power of this Nation to make war. No Federal agency could have any purpose more vital to the national welfare or more national in its scope. It was created in the interest of all the people and if it is to function properly should be administered on a uniform basis throughout the Nation.

This Court refers to the following cases: Carpenter v. Shaw, 280 U. S. 363; Lyeth v. Hoey, 305 U. S. 188; Morgan v. Commissioners, 309 U. S. 78; NLRB v. Hearst, 322 U. S. 111, but it does not attempt to distinguish the situations there involved from that in the instant case. As a matter of fact, the cases cannot be distinguished because in those cases as in this case, there is a nation-wide problem which must be administered on a nation-wide uniform basis. Nowhere in the Court's opinion is there found anything to overcome the presumption of Congressional intent that "real property" is to be given a uniform national meaning (Jerome v. United States, supra).

5. This Court gave no consideration to the discrimination between States which must necessarily result from its decision, nor to the need for uniformity in applying the provisions of an Act which is national in scope, administered by a national agency, in the most vital national interest. In those States where land is subject to a real estate tax, and personal property is subject to a personal propery tax, or is not taxed at all, the Congressional waiver of immunity does not extend to personal property, and such States would be unable to collect any tax on machinery of Defense Plant Corporation. In Pennsylvania, under the holding in this case, machinery of Defense Plant Corporation is changed into real property for the purpose of taxation.

In case of idential plants, one erected in Pennsylvania, and one in an adjoining state such as Ohio, the local taxing district in

Pennsylvania might secure twice as much revenue from the Federal government as the taxing district in such adjoining State.

Failure to adopt a uniform rule for the determination of what is real property, and what is personal property, will result
172 in widespread discrimination against those States which consider machinery in a plant as personal property, and have both a real estate and a personal property tax. The problem is not solved by saying that certain States may not need the additional revenue. Practically every State in the Union taxes machinery but the majority of the States tax it as personal property.

The situation clearly lends itself to discrimination between the States. Congress certainly did not intend any such result. Congress has indicated in the Act itself that it intended a uniform interpretation as to what is real and what is personal. Generally speaking, buildings are considered real property but the Act specifically provides that in those States where a building is considered personality, that the waiver of immunity shall be effective, and such buildings may be taxed by the local authorities. If Defense Plant Corporation is to operate efficiently, it should be administered on a national uniform basis. See Appellant's brief, p. 38-39.

It is submitted with deference that although this Court's opinion states that the question of Federal supremacy was not raised by the Appellee, it is in fact an issue in this case. As stated by the Supreme Court of the United States in Erie Railroad Company v. Tomkins, 304 U. S. 64, at page 78: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." The instant case comes clearly within the exception stated by Justice Brandeis in the Tomkins case, as stated on page 15, of Appellant's brief:

"We cannot conceive of a situation more clearly within the exception stated by Justice Brandeis, and therefore more clearly outside the rule to which the trial court turned for assistance, than one involving a conflict between an arm of the Federal Government and an arm of the State Government respecting the latter's right, if any, under an act of the Federal Congress, to invade the former's constitutional tax immunity."

It is respectfully submitted that this Court in reaching its decision, overlooked two cardinal rules of statutory construction:

1. That a Act should be construed if possible so as to make it unnecessary to declare it unconstitutional. Since Pennsyl-
173 vania taxes personal property under a doctrine which in certain instances considers personal property as real

estate for the purpose of taxation, a serious question arises of the constitutionality of the Pennsylvania Taxing Act, but if the Pennsylvania Act is construed as taxing only real property in the generally accepted sense; which is the only property permitted to be taxed under the Act of Congress, there is no doubt as to the constitutionality of the Pennsylvania Statute. See Appellant's brief, pp. 33–34, citing and quoting from United States v. City of Springfield.

2. That any act in derogation of sovereignty shall be strictly construed. Freedom from taxation is one of the primary incidents of sovereignty. It follows that the waiver of immunity is in derogation of sovereignty. There is no power in Pennsylvania to tax the property of Defense Plant Corporation except in accordance with the Congressional grant. Consequently, the right to tax must be strictly construed, against Pennsylvania. See Appellant's Brief, pp. 31–33. This is especially applicable in view of this Court's statement that "there is difficulty in ascertaining with certainty what Congress meant by the words 'real property' in the Statute."

For the reasons above, petitioner prays that an order be entered granting a reargument in this cause, and that the judgment entered herein on October 31, 1944, be reversed. If this motion for reargument is denied, petitioner prays that an order be entered directing the Prothonotary of this Court to hold the Record in this case for a period of three months during which your petitioner has the right to file a petition for an allowance of an appeal to the Supreme Court of the United States as provided by law.

STERLING NEWELL,
HENRY J. CRAWFORD,
WILLIAM N. GATES,
HAROLD F. REED,
Attorneys for Defense Plant Corporation.

[File endorsement omitted.]

174 In Supreme Court of Pennsylvania

Order refusing petition for reargument

Nov. 17, 44

Per Curiam:
Petition refused.

175 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Petition for allowance of appeal to the Supreme Court of the United States

Filed Jan. 26, 1945

Defense Plant Corporation, the Appellant above named and Petitioner herein, respectfully states that on October 31, 1944 this Court entered a judgment against it and affirming the order of the Court of Common Pleas of Beaver County; that a motion for reargument was filed on November 9, 1944, and that said motion was denied on November 17, 1944.

Petitioner, believing that the judgment of this Court is incorrect, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this Court, and that a transcript of the record in this cause, duly authenticated, shall be sent to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause in compliance with Rule 86 of this Court and Rule 12 of the Supreme Court of the United States.

DEFENSE PLANT CORPORATION,
By STERLING NEWELL,
HENRY J. CRAWFORD,
WM. N. GATES,
SQUIRE, SANDERS & DEMPSEY,
Cleveland, Ohio.
HAROLD F. REED,
REED & EWING,
56½ Third Street, Beaver, Pennsylvania,
By HAROLD F. REED.

[File endorsement omitted.]

176 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Assignment of errors

Filed Jan. 26, 1945

The Court erred:

1. In holding that the Act of May 22, 1933, P. L. 853, Art. II, including Section 201 thereof, as amended, is constitutional in so

far as it purports to authorize the assessment for taxation of machinery owned by Defense Plant Corporation.

2. In holding that the assessment for taxation, as part of the real estate, of machinery owned by Defense Plant Corporation and used in the operation of an industrial plant owned by said Corporation is not repugnant to the Constitution and Laws of the United States.

3. In holding that the Act of Congress approved June 10, 1941, c. 190, Section 3, 55 Stat. 248 (U. S. C. Title 15, Section 610) was to be construed as waiving with respect to machinery owned by Defense Plant Corporation the constitutional immunity otherwise enjoyed by such Agency from state and local taxes.

4. In affirming the order of the Court of Common Pleas of Beaver County, which order confirmed the assessment of machinery owned by Defense Plant Corporation.

DEFENSE PLANT CORPORATION,
By, STERLING NEWELL,
HENRY J. CRAWFORD,
WM. N. GATES,
SQUIRE, SANDERS & DEMPSEY,
Cleveland, Ohio.
HAROLD F. REED,
REED & EWING,
564 Third Street, Beaver Pennsylvania,
By HAROLD F. REED.

[File endorsement omitted.]

177 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Order allowing appeal

Filed Feb. 5, 1945

Defense Plant Corporation, Appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the Commonwealth of Pennsylvania on the 31st day of October 1944, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the Statutes and the Rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be and the same hereby allowed to the Supreme Court of the United States fr the Supreme Court of the Commonwealth of Pennsylvania the above entitled cause, as provided by law, and that the Cl of the Supreme Court of the Commonwealth of Pennsylva shall prepare and certify a transcript of the record, proceedi and judgment in this cause and transmit the same to the S preme Court of the United States, so that he shall have the sa in said Court within thirty days of this date.

It appearing that Appellant is a corporate agency of t United States, its stock being wholly owned, directly
178 indirectly, by the United States, no bond or other securi for the prosecution of such appeal or to answer in da ages or costs shall be required of Appellant.

GEORGE W. MAXEY,
Chief Justice of the
Supreme Court of Pennsylvania.

Dated Feb. 2, 1945.

[File endorsement omitted.]

179 In the Supreme Court of Pennsylvania,
Western District

[Title omitted.]

Stipulation designating parts of the record to be included the transcript on appeal to the Supreme Court of the Unit States

Filed Feb. 19, 1945

It is hereby stipulated and agreed between attorneys for De fense Plant Corporation and attorney for the County of Beave that the record on appeal to the Supreme Court of the Unite States in this cause shall consist of the entire proceedings befo the Supreme Court of Pennsylvania, including:

1. The entire record on appeal to the Supreme Court Pennsylvania from the Court of Common Pleas of Beaver County Pennsylvania, as printed and used in the argument in the Su preme Court of Pennsylvania in this case.

2. The assignments of error made by Defense Plant Corpo ration on appeal to the Supreme Court of Pennsylvania fro the Court of Appeals of Beaver County, Pennsylvania.

3. The docket entries of the Supreme Court of Pennsylvania

4. The opinion of the Supreme Court of Pennsylvania file herein on October 31, 1944;

5. The motion for reargument before the Supreme Court of Pennsylvania, filed November 9, 1944, and the order of Court denying the same, dated November 17, 1944.

6. The petition for allowance of appeal to the Supreme Court of the United States.

7. The jurisdictional statement filed by Defense Plant Corporation, including the copy of the opinion and judgment of the Supreme Court of Pennsylvania thereto appended.

8. Assignments of error on appeal to the Supreme Court of the United States.

180 9. The order of the Supreme Court of Pennsylvania allowing an appeal to the Supreme Court of the United States.

10. Appellee's statement opposing jurisdiction and motion to dismiss.

11. This stipulation.

DEFENSE PLANT CORPORATION,
By STERLING NEWELL,
HENRY J. CRAWFORD,
WILLIAM N. GATES,
SQUIRE, SANDERS AND DEMPSEY,
HAROLD F. REED,
REED & EWING.
COUNTY OF BEAVER,
By JOHN G. MARSHALL,
County Solicitor.

[File endorsement omitted.]

181 [Citation in usual form showing service on John G. Marshall filed Feb. 9, 1945, omitted in printing.]

182 [Clerk's certificate to foregoing transcript omitted in printing]

184 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Feb. 24, 1945

Pursuant to Rule 13, Paragraph 9, of this Court, the Appellant states that it intends to rely upon all of the points in its Assignment of Errors. The Appellant deems the entire record

on appeal as necessary for consideration of the points so to be relied upon.

DEFENSE PLANT CORPORATION,
By HAROLD F. REED,
Its Attorney.

STERLING NEWELL,
HENRY J. CRAWFORD,
WM. N. GATES,
SQUIRE, SANDERS & DEMPSEY,
HAROLD F. REED,
REED & EWING,
Of Counsel.

Service of the above Statement of Points and Designation of Record to be relied on accepted this 10th day of February 1945.

JOHN G. MARSHALL,
County Solicitor and Attorney for Appellee.

185 Supreme Court of the United States

Order noting probable jurisdiction

March 26, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 49432. Pennsylvania Supreme Court. Term No. 979. Defense Plant Corporation, Appellant *vs.* County of Beaver, Pennsylvania. Filed February 24, 1945. Term No. 979 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FEB 24 1945

No. 979

In the Supreme Court of the United States

OCTOBER TERM, 1944

DEFENSE PLANT CORPORATION, APPELLANT

vs.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the Supreme Court of Pennsylvania, Western District

No. 201—March Term, 1944

IN RE: APPEAL OF DEFENSE PLANT CORPORATION FROM ASSESSMENT OF PROPERTY IN THE TOWNSHIP OF BOROUGH, COUNTY OF BEAVER, PENNSYLVANIA

APPEAL OF DEFENSE PLANT CORPORATION

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, and with Rule 86 of the Supreme Court of the Commonwealth of Pennsylvania, the above-named Appellant herewith submits its separate statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause:

(a) The date of the judgment entered by the Supreme Court of Pennsylvania is October 31, 1944. A motion for reargument was filed on November 9, 1944 (R.), and was denied on November 17, 1944 (R.). The petition for appeal was filed in the Supreme Court of Pennsylvania on

(b) The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment complained of is conferred by Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

(c) *State Statute Involved.*—The Statute of the Commonwealth of Pennsylvania which was held to be valid but which the Appellant contends is repugnant to the Constitution and Laws of the United States is the statute providing for the assessment and collection of real estate taxes, Act of May 22, 1933, P. L. 853. (72 P. S. Sec. 5020–1 et seq.), and particularly Section 201 thereof. Section 201 provides as follows:

Subjects of Taxation Enumerated.—The followings subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tanyards, fisheries, and ferries, wharves and all other real estate not exempt by law from taxation.

* * * * *

(d) *Nature of the Case.*—In 1941 Defense Plant Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Act of Congress, acquired certain land in Borough

Township, Beaver County, Pennsylvania (R. 12–a). Thereafter it constructed buildings thereon, caused machinery to be installed therein and leased the establishment thus erected and equipped to Curtiss-Wright Corporation to enable said corporation to perform its war contracts with the United States Government for the manufacture and furnishing of aircraft propellers (R. 14–a).

In 1942 the Borough Township Assessor assessed said property for the 1943–1945 triennial period and included in said assessment the item of machinery assessed at $388,000 (R. 15–a). In March 1943 Defense Plant Corporation appealed to the County Commissioners of Beaver County, sitting as a Board of Revision, from such assessment made upon said machinery, but said Board of Revision sustained the assessment and dismissed the appeal (R. 16–a). Thereupon Defense Plant Corporation took an appeal from such action to the Common Pleas Court of Beaver County and after introduction of an agreed statement of facts, presentation of testimony and argument, said court of June 7, 1944, entered an order dismissing the appeal and approving such assessment (R. 3–a). On June 26, 1944, such order was reaffirmed as the order of the Common Pleas Court en banc (R. 4–a).

Defense Plant Corporation thereupon took a further appeal of the cause to the Supreme Court

of Pennsylvania and said court on October 31, 1944, entered judgment affirming the order of the Court of Common Pleas. A copy of the opinion and order of the Supreme Court of Pennsylvania is appended hereto.

(c) *The Federal Question and the Rulings thereon.*—Appellant initially based its appeal to the County Commissioners of Beaver County from the assessment in question on the ground—

> that the Pennsylvania Statutes, to the extent that they impose a tax on machinery and equipment owned by the Defense Plant Corporation are violative of the Constitution and Statutes of the United States (R. 7-a).

(A second ground of appeal to said Commissioners, namely that such assessment was erroneous by reason of the exemption under the Constitution and Statutes of Pennsylvania of public property used for a public purpose was later abandoned.)

In its appeal to the Court of Common Pleas of Beaver County Appellant's petition alleged that its machinery and equipment was personal property, not real property, that the action of the assessor and of the board of revision in assessing such machinery and equipment "denies the validity of Section 10 of the Reconstruction Finance Corporation Act as amended by the Act of June 10, 1941, aforesaid," and that the Pennsylvania Statutes for taxation of real estate, to the extent

that they impose taxes on such machinery and equipment,

> are invalid on the ground that they are repugnant to the Constitution of the United States, to wit the immunity of the United States and its instrumentalities from taxation by states or political subdivisions thereof and are repugnant to Section 10 of the Reconstruction Finance Corporation Act, as amended (R. 8–a).

Upon appeal from the decision of the Court of Common Pleas to the Supreme Court of Pennsylvania, the Appellant in its brief and in accordance with the requirements of the Rules of the Supreme Court of Pennsylvania, set forth its "Statement of Question Involved," including therein the following:

> 3. Are the Pennsylvania Statutes for taxation of real estate, to the extent that they impose taxes on machinery and equipment belonging to a Federal Agency, whose personal property has been declared exempt from local taxation by a Federal Statute, invalid as being repugnant to the Constitution and Laws of the United States? Answered negatively by the court below.

Both the Court of Common Pleas (R. 125–a et seq.) and the Supreme Court of Pennsylvania in this case (R.) have declared the meaning of the Pennsylvania tax statute hereinbefore quoted as including as a part of the real estate subject to assessment the machinery installed in

or "being an integrated part of the manufactory and so of the freehold." The Appellant has at no time sought to contest this construction by Pennsylvania courts of the Pennsylvania tax law. The contentions consistently made by Appellant, both by brief and at bar, in both courts are briefly as follows:

Since Defense Plant Corporation is a Federal Agency, all its property enjoys under the Federal Constitution a basic exemption from local taxes and accordingly Pennsylvania could impose taxes on any such property only by grace of the Federal Congress in expressly waiving such constitutional immunity. In the Reconstruction Finance Corporation Act of 1941, 15 U. S. C. Section 610, Congress declared that "real property" of Defense Plant Corporation and other designated Federal agencies should be subject to state and local taxes, but that "personal property" of such agencies should remain exempt from such taxes. The determination of the scope of these terms presents a purely Federal question, to be governed by considering the history of the legislation and of analogous acts of Congress, the rule of strict construction against taxability imposed by the basic constitutional immunity, and the necessity, in the face of conflicting local tax practices, of a uniform national definition of taxables and nontaxables of said agencies. In view of these considerations Appellant contended that Congress could not have

intended the scope of these terms to be determined by local legislators and tax administrators and that to avoid constitutional doubts as well as to achieve the necessary uniformity of tax practice all courts must construe "real property" in its narrowest and universally accepted sense. Since the Pennsylvania tax statute as construed by the Pennsylvania courts purported to authorize the assessment for real estate taxes of machinery and equipment located in a Pennsylvania mill or manufactory regardless of the character or mode of installation thereof, it was necessarily in conflict with the Act of Congress and with the Constitutional tax immunity with which said act was concerned.

The Court of Common Pleas, in rejecting the foregoing contentions and affirming the validity of the assessment, concluded that the scope of the term "real property" in Reconstruction Finance Corporation Act of 1941, supra, was to be determined solely by local property law. Thus the court says:

> Our conclusion is, that when the Act of Congress refers to real estate owned by such governmental agencies as Defense Plant Corporation as subject to state and local taxation, it means real estate within the definition of the law of the state in which the statute is sought to be applied; in other words in the instant case, the law of the State of Pennsylvania (R. 148-a).

The Supreme Court of Pennsylvania likewise rejected the foregoing contentions and approved the validity of the assessment made under the Pennsylvania statute, basing its conclusions on either of two alternative grounds. On the one hand it assumed Appellant's position to be that Congress intended "real property" to include whatever the majority of state courts deemed to be fixtures and then concluded such majority view to be in accordance with the Pennsylvania rule respecting machinery in mills and manufactories. On the other hand it recited the contention of Appellee that Congress must have intended the content of "real property" to be determined by the law of the taxing district. Accordingly the court concluded:

"In either view, we all agree the appeal fails." (R.). Thus both the Court of Common Pleas and the Supreme Court of Pennsylvania have denied the existence of immunity from local taxation which Appellant contends has been granted to its machinery both by Act of Congress and by the Federal Constitution and have validated the assessment made under authority of the Pennsylvania tax statute in contravention as Appellant contends, of the Constitution and Laws of the United States.

(f) *Cases Believed to Sustain Jurisdiction.*— The following decisions of the Supreme Court of the United States are believed to sustain its jurisdiction to entertain this appeal:

Standard Oil Company of California v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. C. 1168 (1942). Under a California statute a state tax was levied on the privilege of selling motor vehicle fuel, the statute, however, exempting fuel sold—

> to the Government of the United States or any department thereof for official use of said Government.

The state Supreme Court upheld a levy under the statute upon sales of fuel to post exchanges, therein determining that a post exchange was not "the Government of the United States or any department thereof." The ultimate Federal question thus involved was the character of post exchanges. If the California court was in error in concluding that post exchanges were not Federal instrumentalities, then the state law as construed and applied would be, as contended by the appellant, in contravention of the Federal Constitution. On the question of the right of appeal under the foregoing state of facts, the Supreme Court ruled at page 482:

> Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237 (a) of the Judicial Code.

Appellant submits that the analogy between the case just referred to and the present situation is clear. The ultimate Federal question now in-

volved is as to the character of the machinery of Defense Plant Corporation, that is whether such machinery is taxable real property or exempt personal property within the meaning to be attributed to those terms as used in the Act of Congress. If, as Appellant contends, the Pennsylvania courts are in error in concluding that Congress intended such machinery to be treated for tax purposes as real property, then the Pennsylvania tax statute purporting to authorize such assessment is repugnant both to the Federal Constitution and to the Laws of the United States.

Additional instances in which appeals or writs of error have been allowed by reason of the alleged repugnancy of state laws to the immunity granted by the Federal Constitution are found in *United States et al.* v. *Allegheny County*, 322 U. S. 174, 64 S. C. 908 (1944); *Lee et al.* v. *Osceola and Little River Road Improvement District*, 268 U. S. 643, 69 L. Ed. 1133, 45 S. C. 620 (1925); *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151 (1886).

(g) *The Question is One of Substance.*—The Federal question decided by the Supreme Court of Pennsylvania is substantial and important. In Pennsylvania alone, with which the present litigation is directly concerned, Defense Plant Corporation owns very large investments in plants, plant sites and machinery and equipment. Up to the present time the tax practice in all except four

Pennsylvania counties in which such investments are located is to exclude from assessment of manufacturing establishments the machinery and equipment installed therein. But in the four excepted counties, that is the Counties of Allegheny, Beaver, Washington, and West Moreland, Defense Plant Corporation owns plant machinery and equipment which has been assessed for taxation under the Pennsylvania tax statute hereinbefore quoted in the aggregate sum of approximately $29,900,000. These assessments are all under appeal, the disposition of such appeals awaiting the outcome of the present litigation.

DEFENSE PLANT CORPORATION,
By STERLING NEWELL,
HENRY J. CRAWFORD,
WM. N. GATES,
SQUIRE, SANDERS & DEMPSEY,
Cleveland, Ohio,
HAROLD F. REED,
REED & EWING,
564 Third Street, Beaver, Pennsylvania,
By HAROLD F. REED.

Filed Jan. 26, 1945.
Supreme Court,
Western District.

I have approved the filing of this Statement as to Jurisdiction, with the request that, if necessary, it be considered a petition for certiorari under Section 237 (c) of the Judicial Code.

CHARLES FAHY,
Solicitor General.

In the Supreme Court of Pennsylvania, Western District

No. 201—March Term, 1944

In re: Appeal of Defense Plant Corporation from Assessment of Property in the Township of Borough, County of Beaver, Pennsylvania.

APPEAL OF DEFENSE PLANT CORPORATION

Appeal from the Order of the Court of Common Pleas of Beaver County at No. 320 June Term, 1943

OPINION OF THE COURT

Filed Oct. 31, 1944

LINN, *J.*

The question is, What did Congress mean by the term "real property" in the Act waiving immunity from taxation of certain property owned by government agencies? It is presented by this appeal from the confirmation of a township tax assessment for the triennial period 1942–45. Appellant, Defense Plant Corporation, originally

complained of the entire assessment, which itemized land, buildings and machinery, but at the hearing in the court below conceded the power to tax the land and buildings and denied only the power to tax the machinery.

The parties have agreed that the plant-machinery was "necessary and essential to its [appellant's plant's] existence and operation as a manufacturing plant for aircraft propellers." It was held taxable as real estate pursuant to the General County Assessment Law of May 22, 1933, P. L. 853, 72 PS section 5020-101, providing: "Section 201. Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

"(a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, brew-

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The assessment was itemized:

"Nine (9) Acres improved, assessed at $1,100 per acre	$9,900.00
Twenty-four (24) acres, not improved, assessed at $1,000 per acre	24,000.00
Plant building and cafeteria assessed at	338,000.00
Administration Building, assessed at	32,000.00
Boiler House, assessed at	60,000.00
Personnel Building, assessed at	5,000.00
Machinery, assessed at	388,000.00
Total	$856,900.00"

eries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation."

It has long been the rule in Pennsylvania that "Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold." *Voorhis* v. *Freeman*,[2] 2 W. & S. 116, 119 (1841). This rule prevails in the majority of the states in which the subject has been considered by the courts, as the cases, cited later, show. Appellant's machinery, being an integrated part of the manufactory, and so, of the freehold, was therefore taxable, as other real property in the township was taxable unless the Congressional immunity did not apply.

The Act[3] provides: "Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except

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[2] See also, *Patterson* v. *Delaware Company*, 70 Pa. 381; *Titus* v. *Poland Coal Company*, 275 Pa. 431, 119 A. 540; *Commonwealth Trust Company of Pittsburgh* v. *Harkins*, 312 Pa. 402, 167 A. 278; *Pennsylvania Chocolate Company* v. *Hershey Brothers*, 316 Pa. 292, 175 A. 694; *Central Lithograph Company* v. *Eatmor Chocolate Company*, 316 Pa. 300, 175 A. 697; *Roos* v. *Fairy Silk Mills*, 334 Pa. 305, 5 A. 2d 569; *McClure* v. *Atlantic Rock Company, Inc.*, 339 Pa. 296, 14 A. 2d 124.

[3] Approved June 10, 1941, c. 190, sec. 3, 55 Stat. 248, 15 USCA section 610, amending Act of January 22, 1932, c. 8, sec. 10, 47 Stat. 9.

surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except as provided in section 742a (a) of Title 31. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence, with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not ~~only~~ with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, ~~as amended, to aid~~ the Government of the United States in its national-defense program, (2) the RFC Mortgage Company, the Federal

National Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

Our special concern is with the provisions ". . . except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed . . . Such exemptions shall also be construed to be applicable to . . . personal property owned by . . . [Defense Plant Corporation] . . . but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

What did Congress intend by the term "real property" in the statute which was designed to

waive immunity in aid of the revenues of local communities in which industrial establishments were engaged in manufacturing defense material? Did it intend "real property" to include the entire "mill or manufactory" (as provided by local law) or only the land and vacant buildings without the mechanical part of the plant?

Two suggestions are made by the parties for determining the intended content of the term real property. The appellant says: "We submit that the primary, universally accepted meaning of 'real property' is, as indicated in the foregoing quotations,[4] land together with such tangible items, generally chattel in nature, as have by intention of the interested parties and by their permanent manner of attachment to the land become incorporated into the land, that is, buildings and fixtures."

We think there is such ambiguity and uncertainty in that statement, that we must reject it on the ground that it does not represent the majority view. Our examination of the decisions dealing with the actual and constructive attachment of machinery to the freehold throughout the states, shows that in a majority[5] of the states, the attach-

[4] The quotations are from 1 Tiffany, Real Property (3d ed. 1939), sections 3 and 10; 52 C. J. p. 1156; *In re Inglis*, 69 Okla. 64, 169 Pac. 1083.

[5] The majority referred to includes the following: *Humes* v. *Higman*, 145 Ala. 215, 40 So. 128; *Southern Cotton Oil Co.* v. *Lowery*, 231 Ala. 119, 163 So. 629; *Fechet* v. *Drake*, 2 Ariz. 239, 12 Pac. 694; *Teater* v. *Good Hope Development Corp.*,

ment to the land may be constructive[6] and need not be physical to the extent that removal will result in serious damage to the remaining freehold. In Ohio, for example, only "slight"[7] attachment is

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86 P. 2d 673 (Cal.); *Cary Hardware Co.* v. *McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Atlantic Refining Co.* v. *Feinberg*, 31 Del. 183, 112 A. 685; *Commercial Fin. Co.* v. *Brooksville Hotel Co.*, 98 Fla. 410, 123 So. 814; *Seedhouse* v. *Broward*, 34 Fla. 509, 16 So. 425; *Cunningham* v. *Cureton*, 96 Geo. 489, 23 S. E. 420; *J. & H. Day Co.* v. *Public Sav. Ins. Co.*, 85 Ind. App. 78, 151 N. E. 361; *Ottumwa Woolen Mills Co.* v. *Hawley*, 44 Iowa 57; *Green* v. *Chicago, R. I. & P. R. R.*, 8 Kan. 611; *Parsons* v. *Copeland*, 38 Me. 537; *Dudley* v. *Hurst*, 67 Md. 44, 8 A. 901; *Anderson* v. *Perpetual B. & L. Ass'n.* 190 A. 747 (Maryland); *Southbridge Sav. Bank* v. *Mason*, 147 Mass. 500, 18 N. E. 406; *Commercial Credit Corp.* v. *Com'th Mtge. etc.*, 276 Mass. 335; *Lyle* v. *Palmer*, 42 Mich. 314, 3 N. W. 921; *Detroit Trust Co.* v. *Detroit City Service Co.*, 262 Mich. 14, 247 N. W. 76; *Merchants National Bank* v. *Stanton*, 55 Minn. 211, 218; *Planters Mfg. Co.* v. *Greenwood Agency*, 168 Miss. 892, 152 So. 476; *Knickerbocker Trust Co.* v. *Penn. Cordage Co.*, 66 N. J. Eq. 303, 58 A. 409; *McRea* v. *Central Nat. Bk.*, 66 N. Y. 489; *Foote* v. *Gooch*, 96 N. C. 265, 1 S. E. 525; *Metropolitan Life Ins. Co.* v. *Kimball*, 94 P. 2d 1101 (Oregon); Pennsylvania cases are cited above; *Metropolitan Life Ins. Co.* v. *Jensen*, 9 N. W. 2d 140 (South Dakota); *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 16 S. E. 2d 345; *Pocahontas Coal & Coke Co.* v. *By-Products Pocahontas Co.*, 112 W. Va. 390, 164 S. E. 504; *Thomsen* v. *Cullen*, 196 Wis. 581, 219 N. W. 439.

[6] An interesting discussion of this subject by the Court of Appeal appears in *Tyne Boiler Works Co.* v. *Overseers*, L. R. 18 Q. B. D. 81 (1887).

[7] *Holland Furnace Co.* v. *Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 52 (1939). In this case the court said: "While, to make a chattel a fixture, there must be physical annexation of the chattel to the realty, the annexation may be very slight . . ."

required. The evidence in the record shows that some of the machinery in appellant's plant is easily removable; some is bolted to foundations; "hoists, the monorail, or crane runway" appear to be built in and supported by the structural part of the building. For some states, no decisions were found. In some states, statutes provide that certain classes of machinery shall be assessed as real property.[8]

On the other hand, the appellee submits that, in abolishing immunity and conferring the local power of taxation, Congress must have intended the content of the term real property to be determined by the law of the taxing district. In the condemnation proceeding, *U. S. ex rel T. V. A. v. Powelson,* 319 U. S. 266, 63 Sup. Ct. 1047, 1054, the court said at page 279, "Though the meaning of 'property' as used in § 25 of the Act and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to the local law." The rule was applied in *U. S. v. Bechtold Co.,* 129 F. 2d 473 (C. C. A. 8th, 1942) and in *U. S. v. 19.86 Acres of Land,* 141 F. 2d 344 (C. C. A. 7th, 1944), similar cases being referred to in the opinions.

Against the adoption of the local definition of real estate, the appellant refers to several cases:

[8] Vermont, Pub. L. (1933) sec. 586; Utah, Code Ann. (1943) 80-3-1; Kansas, Gen. Stat. (Corrick 1935) sec. 79-102; Rhode Island, Gen. Laws (1938), c. 30, sec. 3.

Carpenter v. *Shaw*, 280 U. S. 363, 50 Sup. Ct. 121; *Lyeth* v. *Hoey, Collector*, 305 U. S. 188, 59 Sup. Ct. 155; and *Morgan* v. *Commissioner*, 309 U. S. 78, 60 Sup. Ct. 424. In the *Carpenter* case it was necessary to determine what Congress meant by the word "lands" in the Act ratifying the Atoka Agreement with certain Indian tribes then in Oklahoma Territory. The Act provided ". . . the lands allotted shall be nontaxable while the title remains in the original allottees." The question was whether oil royalty reserved by allottee-lessors was exempt or was taxable as personal property by the State of Oklahoma and the royalty was held nontaxable. The *Lyeth* and the *Morgan* cases involved the construction of the Federal Revenue Act, in one case the meaning of the word "inheritance" and in the other, the meaning of the term "general power of appointment." It was held that national uniformity in the collection of income and inheritance taxes required the application of the generally understood meaning of "inheritance" and of "general power of appointment," unaffected by local variations from the generally understood meaning of the words. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, determining what Congress meant by the word "employes" in the Wagner Act, was also referred to. It was held that as the Act was "administered by a national agency, intended to solve a national prob-

lem on a national scale," local definitions of the word must be rejected. Those cases, and others which might be added, illustrate the application of the principle of federal supremacy, a principle not challenged by the appellee. Its submission is that when Congress conferred the power of "local taxation [of real property] to the same extent according to its value as other real property is taxed" without defining real property in the Act, it necessarily intended that all the property within the taxing district considered to be real property, should be taxable; that if this construction was rejected, the machinery constituting part of appellant's plant would be exempt while like machinery of a private individual would be taxed; that one purpose of the Act was to remove such discrimination as had formerly existed, in order that tax burdens might be more equitably distributed.

The brief filed on behalf of Allegheny County states that: "The amending Act of 1941 originated in the Senate as S. 1438 of the 77th Congress, 1st Session. Section 3 of the bill amends Section 10 of the original Act. In commenting on the existing law (i. e., the provisions of Section 10 of the original Act), the report of the Committee on Banking and Currency (S. Rep. No. 292), submitted through Senator Brown, contains the following relevant sentence: 'The only qualification of these exemptions provides that real property of

the Corporation is to be subject to nondiscriminatory State and local taxes.'" In the brief of the appellant it is said that Pennsylvania furnishes an "example of tax diversity." Different taxing districts may have different rates of assessment or none at all; such diversity is not prohibited; what the law prohibits is discrimination within the boundaries of the taxing district. The Constitution of Pennsylvania allows classifications of municipalities, counties, townships, etc., and classification has been made pursuant to that power. For cities of the first class, for example, the law provides that in the ". . . assessment of real estate for taxation, the machinery and tools used in manufacturing in any mill or manufactory shall not be considered or included in determining the value of real estate." Act of June 3, 1915, P. L. 787, 53 PS section 4742. In cities of the second class such property is not taxable for city or school purposes: Act of March 7, 1901, P. L. 20, Art. XIX, section 3, cl. 1, amended by the Act of May 12, 1911, P. L. 287, section 1, 53 PS section 9634. But the mere fact that in some taxing districts certain property is taxable and in others is exempt, is of no consequence in this review because appellant does not contend that there was discrimination against its property in the taxing township. For the same reason it would seem to be immaterial if in some states it may be found unnecessary to raise revenue by taxing such property.

There is difficulty in ascertaining with certainty what Congress meant by the words real property in the statute. There is no federal general common law[9] to which we can turn for aid. In 36 Words and Phrases, p. 221, many varying definitions of real property are given. Dictionaries define it as land, real estate, realty, and the like. Any adequate definition must take account of the doctrines of fixtures and of equitable conversion. We understand appellant's position to be that Congress intended that the content of the term real property should be the view prevailing in the majority of the states that have dealt with the subject of chattels made part of the freehold. The cases cited above in note 5 show that the majority view is contrary to that suggested as the standard. If appellant is correct in suggesting that the Congressional meaning is to be found in the prevailing view among the states, we must hold that the machinery was properly included in the assessment of real estate and entitled to the waiver of federal immunity. If, on the other hand, we accept the appellee's submission that Congress intended that the content of the term real property should be found in the law of the assessing district, the machinery was properly included in the assessment. In either view, we all agree that the appeal fails.

Order affirmed.

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[9] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, 58 Sup. Ct. 817, 822.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 979

In the Supreme Court of the United States

OCTOBER TERM, 1944

DEFENSE PLANT CORPORATION, APPELLANT

v.

COUNTY OF BEAVER, PENNSYLVANIA

REPLY TO MOTION TO DISMISS OR AFFIRM

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 979

DEFENSE PLANT CORPORATION, APPELLANT

v.

COUNTY OF BEAVER, PENNSYLVANIA

REPLY TO MOTION TO DISMISS OR AFFIRM

This reply is directed to the position of the appellee in its motion to dismiss or affirm that the Federal question raised in the jurisdictional statement is not substantial. This reply is therefore germane whether the appeal papers are treated as an appeal or, under Section 237 (c) of the Judicial Code, as a petition for certiorari.

The Pennsylvania taxing statute, as applied to the machinery here involved, is in conflict, it is submitted, with the provisions of the Federal statute which reaffirm the constitutional immunity of the appellant from local taxation save only with respect to its "real property." Act of June 10, 1941, sec. 3, 55 Stat. 248, 15 U. S. C. sec. 610. The Federal Act specifically provides

that "Such exemptions shall also be construed to be applicable to the loans made, and *personal property* owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1) [including Defense Plant Corporation] * * *." *Ibid.* (Italics added.)

In its treatment of the problem the court below failed to give to the provision concerning real property the limited construction appropriate to the waiver of tax immunity. This Court has had occasion to observe that with this limited qualification the tax immunity provision of the Reconstruction Finance Corporation Act "was intended to give as wide immunity as possible to the functions and activities of the corporation." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 101, note 7, quoting House and Senate Committee Reports.[1] The court below likewise failed to consider the significance of the statutory provision in the same section that the exemptions "shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes."

[1] The Reports state: "Section 10 has generally been understood to assert the broadest possible constitutional immunity from the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon 'the Corporation,' while specifically consenting to the taxation of real property alone." S. Rep. 1545, 74th Cong., 2d sess., p. 1; H. Rep. 1995, 74th Cong., 2d sess., p. 1.

This indicates a caution that in construing the Federal law the classification of property as real or personal is not to depend upon particular state laws. It likewise indicates that the clause providing that taxation of appellant's real property shall be non-discriminatory does not control the definition of such property but only the amount of taxation once the property is identified.

It is our position that the concept of real property as employed by Congress is to be understood in a uniform sense, in the light of the familiar and common acceptance of the term, and is not to be derived from latitudinarian categories which may be adopted by the states for a variety of purposes. In this view, the decision below is erroneous, for the findings of the trial court disclose that the property in question consists of machinery either not attached to the building or so attached that it is readily removable without injury, and indeed that such machinery has frequently been transferred to and from the premises. To hold that such property is real property within the meaning of the exclusion provision would open the door to multiple state taxation of movable property owned by the appellant and would defeat the intention of Congress that personal property is to retain its tax-immune status.

The question is an important one. The provision here involved is substantially similar to those relating to many other Federal agencies. See the Government's brief in *Federal Public*

Housing Authority v. *Guckenberger*, No. 388, present Term, p. 24. The plants and projects constructed and owned by appellant alone are located in forty-six states, represent a total cost to appellant of approximately $8,000,000,000, of which amount approximately $5,000,000,000 represents cost of machinery and equipment. The same question here presented is now pending before various lower courts in the States of California, Louisiana and Texas, as well as in Pennsylvania, and has been raised administratively by the taxing authorities in several other states. It is submitted that a question of such scope should be definitely settled by this Court's construction of the Act of Congress so that a multiplicity of litigation may be avoided, a uniform interpretation of the law obtained and an orderly administrative practice established by appellant with respect to local taxation of its real property and the proper expenditure of public funds.

Respectfully submitted.

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No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1945

RECONSTRUCTION FINANCE CORPORATION, SUCCESSOR TO DEFENSE PLANT CORPORATION, APPELLANT

v.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION

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In the Supreme Court of the United States

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No. 40

RECONSTRUCTION FINANCE CORPORATION, SUCCESSOR TO DEFENSE PLANT CORPORATION, APPELLANT

v.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION

OPINIONS BELOW

The opinion of the Court of Common Pleas of Beaver County, Pennsylvania (R. 53–77), is reported in the Beaver County Legal Journal, Volume 6, page 52. The opinion of the Supreme Court of Pennsylvania (R. 83–88) is reported in 350 Pa. 520, 39 A. (2d) 713.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered October 31, 1944 (R. 88). A petition for reargument filed by Defense Plant

Corporation (R. 89–95) was denied November 17, 1944 (R. 95). The petition for allowance of an appeal was filed on January 26, 1945 (R. 96) and the order of the Supreme Court of Pennsylvania allowing the appeal was entered February 2, 1945 (R. 97–98). This Court, by order of March 26, 1945, noted probable jurisdiction (R. 100). The jurisdiction of this Court rests on Section 237 (a) and (c) of the Judicial Code, as amended.

Section 237 (a), as amended, permits an appeal from a state court in cases where there "is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * or laws of the United States, and the decision is in favor of its validity." The Section plainly applies whether it is contended that a state law contravenes the Constitution or a federal statute. Thus appellee's suggestion (in its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm) that jurisdiction may be lacking under Section 237 because the scope of a federal statutory exemption is in issue and not a "question of constitutional immunity", is groundless. The issue here is whether the Pennsylvania statute, as applied to the facts of this case, is in conflict with the federal statute, and, if so, unconstitutional. Cf. *Wilson v. Cook*, No. 328, decided March 4, 1946. In any event, the Court may treat the appeal papers as a petition for certiorari under Section 237 (c), and the issue presented is

clearly important enough to warrant the granting of the writ. Cf. *United States* v. *County of Allegheny*, 322 U. S. 174.

QUESTIONS PRESENTED

(1) Whether a federal statute allowing the states to tax "real property" but not "personal property" of the Reconstruction Finance Corporation and Defense Plant Corporation permits the taxation of machinery installed at a manufacturing plant, when such machinery, though necessary to the manufacturing operations, was easily removable without damaging the land or buildings and was not intended to be a permanent attachment to the freehold.

(2) Whether Congress intended the meaning of "real property" in Section 10 of the Reconstruction Finance Corporation Act, as amended, to depend upon the law of the locality in which the property involved was located.

STATUTES INVOLVED

Section 10 of the Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, 9, as amended by Section 3 of the Act of June 10, 1941, 55 Stat. 248 (15 U. S. C., Supp. IV, Sec. 610), reads as follows (1941 additions are in italics):

> Sec. 10. Any and all notes, debentures, bonds or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except

surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except as provided in section 1 (a) of the Public Debt Act of 1941. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. *The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 5d of this Act, as amended, to aid the Government of the United States in its national-defense program, (2) The RFC Mortgage Company, the Federal National Mortgage Association,*

and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2) or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes.

The Pennsylvania Act of May 22, 1933, P. L. 853, as amended by the Act of July 2, 1941, P. L. 219 (72 Purdon's Pa. Stat. (1936) 5020–201) reads as follows:

SECTION 201. Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tanyards, fisheries, and

ferries, wharves, and all other real estate not exempt by law from taxation.

STATEMENT

In 1941 Defense Plant Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Act of Congress, acquired certain land in Borough Township, Beaver County, Pennsylvania (R. 7). Thereafter it constructed buildings on the property, caused machinery to be installed therein, and leased the establishment thus created and equipped to Curtiss-Wright Corporation to enable that corporation to perform its war contracts with the United States Government for the manufacture and furnishing of aircraft propellers (R. 7).

In 1942 the Assessor for Borough Township, Beaver County, Pennsylvania, assessed the property for the 1943–1945 triennial period, and included in the assessment the item of machinery assessed at $388,000 (R. 8). The assessment was made under the state statute set forth above.

In March, 1943, Defense Plant Corporation appealed to the County Commissioners of Beaver County, sitting as a Board of Revision, from the assessment made upon the machinery, but the Commissioners sustained the assessment and dismissed the appeal (R. 8). Thereupon Defense Plant Corporation took an appeal to the Common Pleas Court of Beaver County alleging in its petition (R. 3–6) that its machinery and equipment were personal property, not real property, that the action of the assessor and of the board of revision in assessing such machinery and equipment "denies the validity of Section 10 of the Reconstruction Finance Corporation Act as amended by the Act of June 10, 1941 aforesaid", and that the Pennsylvania statutes for taxation of real estate, "to the extent that they impose taxes on such machinery and equipment, are invalid on the ground that they are repugnant to the Constitution of the United States, to wit: the immunity of the United States and its instrumentalities from taxation by states or political subdivisions thereof and are repugnant to Section 10 of the Reconstruction Finance Corporation Act, as amended."

After introduction of an agreed statement of facts (R. 6–21), presentation of testimony, and argument, the court, on June 7, 1944, entered an order dismissing the appeal and approving the assessment (R. 2). On June 26, 1944, such order was reaffirmed as the order of the Common Pleas Court *en banc* (R. 3).

Defense Plant Corporation thereupon took a further appeal to the Supreme Court of Pennsylvania. On October 31, 1944, that court entered judgment affirming the order of the Court of Common Pleas (R. 83–88). A petition for rehearing was denied November 17, 1944 (R. 95).

By Public Law 109 of the 79th Congress, approved June 30, 1945, c. 215, Defense Plant Cor-

poration was dissolved and all its functions, powers, duties, authority, assets and liabilities were transferred to Reconstruction Finance Corporation. A motion filed with this Court on April 3, 1946, pursuant to Section 2 of said Public Law 109, prays that Reconstruction Finance Corporation be substituted as the appellant herein.

The case turns on the facts, which are undisputed, relating to the assessed machinery. The machinery is listed in an exhibit found at R. 51–52. The machines include 10-ton cranes, milling, cutting, and grinding machines, lathes, presses, shapers, saws, electric trucks, and "small grinders and other hand tools." Most of the machinery is not attached to the building at all, but is held in place by its own weight. Other portions are attached by screws and bolts which are easily removable. All of the machines can be removed without damage to the building or to the machines. (R. 33–34, 38, 45, 57.)

The lease by Defense Plant to Curtiss-Wright (R. 11–21) provided (R. 14):

> ELEVEN. Title to the site, buildings, and Machinery to be acquired hereunder shall, unless and until the same shall be transferred by Defense Corporation in accordance with the provisions hereof, be vested in Defense Corporation, *and such Machinery shall remain personalty notwithstanding the fact it may be affixed or attached to realty.* [Italics supplied.]

The lease contained an express provision for the transfer of the machinery to other plants, as follows (R. 19):

> NINETEEN. Lessee may use such items of Machinery as it may designate in writing to Defense Corporation, in connection with the manufacture and furnishing of aircraft propellers and other products for the Government *in any other plants of Lessee.* Lessee may also, with the written approval of Defense Corporation and the War Department, *lease or lend to any suppliers any item of Machinery,* the lease or loan of which it may deem necessary for the performance by Lessee of its contracts with the Government. [Italics supplied.]

The lease further provided that on its termination the lessee should place lessor in possession of the site, buildings, and machinery (R. 18–19):

> * * * and *if any of the Machinery shall be then located elsewhere than in the additional plant to be provided hereunder,* Defense Corporation shall, in addition, have the right to remove, and upon the written request of Lessee, shall promptly remove, at its own expense, such Machinery, and if such removal shall not take place within sixty (60) days after such request, Lessee may remove the Machinery and place it in storage for the account and at the expense of Defense Corporation, and Defense Corporation shall have corresponding rights and Lessee shall have corresponding rights

and obligations with respect to removal and storage of such machinery not owned by Defense Corporation as may then be located in the additional plant to be provided hereunder. [Italics supplied.]

The undisputed testimony shows that the original machinery installed in the plant had been transported from a plant in which it had previously been used for manufacturing propellers, without the prior plant being damaged by the removal (R. 32–33). The machinery is moved around freely, without any damage of consequence, in its present location (R. 34). In eighteen months probably 90% of it has been rearranged (R. 34). Approximately 40% had been replaced. The effect upon the freehold of these removals was stated to be "none whatsoever". (R. 34.) These changes resulted from "change of design or improvements in such designs" and "obsolescence" (R. 34), and because "We find it necessary to streamline our production lines about once a year, in order to keep up with changes and developments concerning the operation of manufacturing the hollow propeller blades" (R. 35).

It was testified that "all of the installations are designed with a view towards flexibility; the electrical connections to the machines are merely made by a plug into the 'bus' duct above the machine" (R. 35). Very frequently machinery had been interchanged with other plants (R. 36). The machines are moved out at the rate of one

or two a week; "in fact, in three weeks time from now we are going to move forty-five machines out" (R. 44). The machinery is moved from one plant to another in order "to take advantage of machinery that is available, if it is critical; not to have to go out and buy it" (R. 45).

All of the machinery, of course, was necessary to the manufacturing of propellers (R. 44, 57). But the building is a "typical manufacturing building" and is suitable for "almost any manufacturing type of job which has to be done, excepting something that requires a special type of building" (R. 37).

On these facts, the Court of Common Pleas held that Congress intended that whether machinery was "real property" within the meaning of Section 10 was to be determined by the law of the state, and that under Pennsylvania law the machinery was taxable as real estate (R. 77). The Pennsylvania Supreme Court, in affirming, held that the machinery was taxable as real estate whether the law in the assessing district or "the prevailing view among the states" be applied (R. 88). The court noted that in some taxing districts the Pennsylvania statutes specifically provide that machinery is not to be assessible as real estate (R. 88).

SPECIFICATION OF ERRORS TO BE URGED.

The assignments of error are set out at R. 96–97. The Supreme Court of Pennsylvania erred:

1. In holding that the Act of May 22, 1933, P. L. 853, Art. II, including Section 201 thereof, as amended, is constitutional in so far as it purports to authorize the assessment for taxation of machinery owned by Defense Plant Corporation.

2. In holding that the assessment for taxation, as part of the real estate, of machinery owned by Defense Plant Corporation and used in the operation of an industrial plant owned by said Corporation is not repugnant to the Constitution and Laws of the United States.

3. In holding that the Act of Congress approved June 10, 1941, c. 190, Section 3, 55 Stat. 248 (U. S. C., Supp. IV, Title 15, § 610) was to be construed as waiving with respect to machinery owned by Defense Plant Corporation the constitutional immunity otherwise enjoyed by such agency from state and local taxes.

4. In affirming the order of the Court of Common Pleas of Beaver County, which order confirmed the assessment of machinery owned by Defense Plant Corporation.

SUMMARY OF ARGUMENT

A

Congress did not intend the waiver of immunity from state taxation for "real property" to extend to portable manufacturing machinery never meant to be a permanent accession to the building in which it was placed. The history of

the waiver, stemming from the provision for national banks in 1864, indicates that Congress meant the waiver to extend only to land and buildings, and to attachments in a narrow sense. The historical use of the waiver for the real estate of financial institutions exclusively, the early cases excluding bank fixtures in the same category as the machines involved here, the absence of any other attempt during three-quarters of a century to extend the waiver beyond real estate in the narrow sense, the separate reference to "lands", "plants" and "equipment, supplies, and machinery" in the 1940 Act, the addition of an express prohibition against the taxation of personal property in the 1941 Act by way of reaffirmation of the prior understanding, and the deliberate limitation of a 1941 amendment to buildings, all support this interpretation of the Act.

B

Furthermore, the purpose of the waiver is to prevent the depletion of a locality's tax resources which occurs when the United States becomes the owner of land. This policy does not apply to portable machinery, which is frequently brought into the taxing district by the United States. To permit state taxation of such machines does more than preserve the local revenues against depletion; it allows the locality to gain at the Nation's expense.

C

The same result follows if one applies the commonly accepted tests by which it is determined whether a chattel is to be treated as part of the realty. Despite variation in the weight given to the other factors, such as the method of annexation, the courts in this country have with substantial uniformity—apparently except for Pennsylvania—held that whether a chattel becomes a fixture depends primarily on whether it is intended to be permanently affixed to the land. Under this test the machinery here involved, which the parties correctly contemplated from the beginning would frequently be removed, transferred and replaced, and which is readily movable without damage to the building or to the machinery itself, would not lose its status as personal property. The Pennsylvania doctrine, as here applied, which seems to mean that all machines necessary to a business carried on in an establishment form part of the real estate irrespective of whether they were meant to be a permanent accession to the land, is entirely out of line with the general understanding, and Congress undoubtedly legislated with the latter in mind. The same test is applied by the states in tax as in other cases. A very few states statutes expressly subject machinery to the real property tax, but in only one of these states could such a provision apply to the property of the United States.

D

We believe that Congress intended the waiver to extend only to land, buildings, and such fixtures as are essential to a building's operations, such as the heating plant. In any event, Congress did not have in mind a conception broader than the accepted meaning of "real property" throughout the country.

In addition to indicating what Congress meant by "real property", the above considerations show that Congress did not mean to allow "real property" to be defined by the local law of each state or taxing district. The normal assumption is that Congress intends its laws to operate uniformly throughout the nation, and a great many cases show that this rule is given effect when a Federal statute embodies a common law term. Nothing in its background, history, or language suggests that the waiver in the RFC Act was meant to be dependent upon state law. To permit states or localities to define "real property" so as to include what would normally be regarded as personalty would defeat the Congressional purpose, explicitly set forth both in the affirmative and in the negative, that only real and not personal property be subject to state taxation.

ARGUMENT

THE MACHINERY OF DEFENSE PLANT CORPORATION IS NOT TAXABLE BY THE STATES

It is conceded that the property of Defense Plant Corporation is exempt from state taxation

except to the extent that Congress has waived the exemption. See *Maricopa County* v. *Valley National Bank*, 318 U. S. 357. The case accordingly turns upon the meaning of Section 10 of the Reconstruction Finance Corporation (RFC) Act, which, as amended, permits the states to tax the "real property" but not the "personal property" of appellant.

This case involves an attempt by a Pennsylvania county[1] to tax the same type of machinery as was involved in *United States* v. *County of Allegheny*, 322 U. S. 174. The cases differ, however, in that the machinery in the *Allegheny* case was owned by the United States through the War Department, and no Federal law allows the states to tax the "real property" of the War Department. The *Allegheny* case thus did not present the issue now before the Court.

It is our position that when Congress waived the exemption from state taxation for the real property of the RFC and its affiliates, it intended to permit the states to tax the land and buildings and those fixtures which are so integrated with the buildings as to be uniformly, or, at most, generally, regarded as real property. The machinery in-

[1] The court below noted that in parts of Pennsylvania machinery was not taxable as real property. (R. 88.) Only six of Pennsylvania's counties have sought to assess the machinery of Defense Plant or RFC.

question here clearly is not real property under that criterion. Furthermore, we submit, Congress did not intend the meaning of "real property" under the Act to vary with the law of each state or taxing district. To permit states or localities to define the term so as to include what would normally be regarded as personalty would defeat the Congressional purpose, explicitly set forth both in the affirmative and in the negative, that only "real property" and not "personalty" be subject to state taxation.

The questions as to whether Congress intended state law to govern, and if not, what "real property" was intended to mean, are, of course, not the same; but the same material manifests the legislative intent as to both points. We shall accordingly first consider the pertinent material without differentiating between the two issues.

A. THE HISTORY OF THE EXEMPTION

The phrases "real property" and "personal property" are not defined in the RFC Act. But light is thrown on their meaning by their history and their derivation.

The exemption of real estate from the general rule of immunity for Federal property did not originate in the RFC Act. Prior to 1941 a number of statutes, all of which were concerned

with Federal financial institutions, contained similar provisions.[2] The forerunner of these was the Act of June 3, 1864, 13 Stat. 99, 111 (12 U. S. C. § 548) authorizing the creation of national banking associations. Under that Act, subsequently embodied in R. S. 5219, the shares of national banks were subjected to state taxation at rates no higher than those imposed upon competitive institutions in the states. As to real property R. S. 5219 provides that:

> Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

We have been unable to find anything in the legislative history of the 1864 Act throwing light upon the meaning of the quoted provision, which was only an insignificant item in a long measure devoted to financing the Civil War. The decisions under R. S. 5219 do not contain any considered discussion of the breadth of the real property exemption. But various state and lower

[2] These laws are listed in House Doc. No. 216, 78th Cong., 1st sess., *Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate*, p. 39. See note 7, *infra*, p. 20.

Federal courts have held that bank "fixtures", "safes and fixtures", "safe and furniture", and even "machinery and equipment", are personal property and hence exempt from taxation. The "safes and fixtures", which presumably were removable but essential to the bank's business, would seem to be indistinguishable from the machinery involved in this case insofar as their status as "real property" is concerned.

The subsequent statutes on the subject, including the RFC Act, were presumably based on the clause in R. S. 5219, which had been construed not to reach movable but necessary chattels.

The next statute embodying the exception was the Federal Reserve Act of 1913 (38 Stat. 251, 258, 12 U. S. C. § 531) Section 7 of which provided that "Federal Reserve Banks * * * shall be exempt from Federal, State, and local taxation, except taxes upon real estate". The history of that Act contains no explanation of the exception for real property. From then on, as Federal financial activities expanded, the provision for tax exemption except for real property was apparently included

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[3] *San Francisco* v. *Crocker-Woolworth National Bank*, 92 Fed. 273 (C. C. N. D. Cal.); *First National Bank* v. *San Francisco*, 129 Cal. 96.

[4] *People* v. *National Bank of D. O. Mills & Co.*, 123 Cal. 53.

[5] *National State Bank of Oskaloosa* v. *Young*, 25 Ia. 311.

[6] *Bank of California* v. *King Co.*, 16 F. Supp. 976 (W. D. Wash.).

as a matter of course in twelve other laws.[7] The REC Act of 1932 adopted the customary language without discussion of the point in Congress.

Some of the acts contained variations which are significant in that they demonstrate Congressional awareness of and attention to the problem. Thus two statutes authorized the taxation both of real and tangible personal property.[8] In addition, in many statutes Congress has made other provision for contributions to the states in lieu of taxes.[9]

So far as we have been able to ascertain the only decisions under any of these statutes with respect to the meaning of the real estate exemption

[7] Federal Land Banks and National Farm Loan Associations, 39 Stat. 380, 12 U. S. C. §§ 931, 933 (1916); National Agricultural Credit Corporation, 42 Stat. 1469, 12 U. S. C. § 1261 (1923); Reconstruction Finance Corporation, 47 Stat. 9, 15 U. S. C. § 610 (1932); Federal Home Loan Banks, 47 Stat. 735, 12 U. S. C. § 1433 (1932); Home Owners Loan Corporation, 48 Stat. 129, 12 U. S. C. § 1463c (1933); Federal Deposit Insurance Corporation, 48 Stat. 168, 12 U. S. C. § 264 (p) (1933); Federal Farm Mortgage Corporation, 48 Stat. 347, 12 U. S. C. § 1020f (1934); Federal Housing Administration, 48 Stat. 1252, 12 U. S. C. § 1714 (1934); National Mortgage Associations, 48 Stat. 1255, 12 U. S. C. § 1722 (1934); Federal Savings & Loan Insurance Corporation, 48 Stat. 1256, 12 U. S. C. § 1725c (1934); Commodity Credit Corporation, 52 Stat. 108, 15 U. S. C. § 713a–5 (1938); War Housing Insurance, 55 Stat. 61, 12 U. S. C., Supp. IV § 1749 (1941).

[8] 48 Stat. 267, 12 U. S. C. § 1138c (1933) (Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives); 48 Stat. 1222, 12 U. S. C. § 1768 (1934) (Federal Credit Unions).

[9] See House Doc. No. 216, 78 Cong., 1st sess., *Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate*, pp. 39–41.

are those under R. S. 5219, referred to above. The Federal institutions affected were financial organizations whose real property would be likely to consist of their bank buildings and the land upon which the buildings were located, and any property they might take over on foreclosure—undoubtedly in the main lands and buildings without production facilities, though perhaps with "fixtures" necessary to the banking business. Inasmuch as it is almost certain that the Federal agencies would have resisted an attempt by the states to tax movable machinery under any of these statutes, we think it fair to assume that the absence of pertinent decisions means that no such attempts have heretofore been made. The cases holding fixtures and safes to be personal property are, however, quite closely in point.

Prior to 1940 the activities of the RFC were primarily financial in nature. In that year Congress authorized the RFC to organize corporations to construct and operate plants for the manufacture of war materials and to purchase critical supplies. 54 Stat. 573, 15 U. S. C. § 606b. The 1940 Act refers separately to "land", "plants", and "equipment, supplies, and machinery".[10] The

[10] The Act provides (54 Stat. 573, 15 U. S. C. § 606b):

In order to aid the Government of the United States in its national-defense program, the Corporation is authorized—

. . . . . .

(3) When requested by the Federal Loan Administrator, with the approval of the President, to create or to organize a

intimation is clear that machinery was not regarded in the same category as land and plants, but with equipment and supplies, which are unquestionably personalty. Pursuant to this statute the Defense Plant Corporation was created.

In 1941 § 10 of the RFC Act was amended. The Committee reports disclose that the amendment had two objectives: (a) To reaffirm "the original policy of the Congress with respect to such exemptions", and (b) to clarify the position of various affiliates of RFC, including Defense Plant, by providing specifically that the exemption applied to them. Sen. Rep. No. 292, House Rep. No. 514, 77th Cong., 1st sess. See also 87 Cong. Rec. 4163, 4507, 4518, 4520, 4521, which emphasized that the new Act was "simply a clarification and a positive statement of existing law" (p. 4520).

The proposed 1941 amendment added two sentences to section 10 of the 1932 RFC Act. The first stated that the Act should apply to Defense Plant Corporation, *inter alia*. The second explicitly declared that the tax exemption should be applicable to the "personal property" owned by the corporations affected.

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corporation or corporations, with power (a) to produce, acquire, and carry strategic and critical materials as defined by the President, (b) to purchase and lease land, to purchase, lease, build, and expand plants, and to purchase and produce equipment, supplies, and machinery, for the manufacture of arms, ammunition, and implements of war * * *

On the floor of the House an additional clause was added by Committee amendment. Representative Steagall, for the Committee, explained that Representative Rabaut of Michigan had called his attention to the fact (87 Cong. Rec. 4524):

> * * * that under certain circumstances real estate held under these contracts is treated as personal property in that State. The Rabaut amendment provides that where real estate, buildings, or structures are considered by the law of a State as personal property, they shall not be included in the provisions of this bill which excepts personal property from taxation.

A colloquy ensued in which it was stated by Representative Wolcott (a member of the Committee) that the law in Michigan, and elsewhere, was that "It is all a question of intent" and that buildings were "presumed to be a part of the realty until the contrary is shown". *Ibid.* An amendment was then adopted, stating that "such exemptions shall not be construed to be applicable in any State to any buildings or structures which are considered by the laws of such State to be personal property for taxation purposes." *Ibid.* The bill passed the House in that form. In conference the only pertinent change made was the elimination of the words "or structures" from the floor amendment. The conference report to the House (87 Cong. Rec. 4767) stated as to this change: "* * * There was no corresponding

provision in the Senate bill. The conference agreement retains the House provision *except that it is limited to 'buildings' instead of 'buildings or structures.'*" [Italics supplied.] In this form the bill was enacted.

The amendment shows that Congress intended buildings to be taxable irrespective of whether they were regarded as real or personal property under state law. It thus demonstrates that Congress did not mean peculiar State concepts as to "real property" to be controlling. In addition, the fact that only buildings were referred to, together with the deliberately restrictive elimination of the broader term "structures", is strong evidence that Congress assumed that only land and buildings—real property in the normal sense—was being subjected to State taxation.

Although no one of the items in the above analysis of the history of the waiver for real property would itself be conclusive, we think that taken together they indicate that Congress meant the waiver to extend only to land and buildings, and to attachments in a narrow sense. The historical use of the waiver for the real estate of financial institutions exclusively, the early cases excluding bank fixtures in the same category as the machines involved here, the absence of any other attempt during three-quarters of a century to extend the waiver beyond real estate in the narrow sense, the separate reference to "land", "plants" and

"equipment, supplies, and machinery" in the 1940 Act, the addition of an express prohibition against the taxation of personal property in the 1941 Act by way of reaffirmation of the prior understanding, and the deliberate limitation of the Michigan amendment to buildings, all point in the one direction.

B. THE PURPOSE OF THE WAIVER

That Congress has not intended its waiver of the Constitutional exemption for real property to extend to portable machinery, is confirmed by the underlying purpose of the provision. States and localities were, of course, known to be dependent upon their property taxes as their main sources of revenue. When the United States becomes owner of land in a taxing district the district's tax resources are to that extent depleted and its revenues impaired. A desire to avoid such a diminution of local tax revenues, coupled with recognition that the imposition of a tax on immovable real property by a single jurisdiction would not be likely to impose a heavy burden on the Federal Government, doubtless is the reason for the standard real property waiver provision.

When it enacted the 1941 amendment Congress was quite conscious that the rapidly expanding defense construction program would necessitate the acquisition of large amounts of land and of the effect of such acquisitions upon local revenues. See 87 Cong. Rec. 4516. And yet with this in

mind, in addition to extending the standard waiver for realty to RFC subsidiaries, Congress took the unusual course of explicitly declaring that "personal property" was not to be taxed. See p. 22, *supra*.

We believe that entirely different considerations govern the taxability of personal property, whether machinery or other materials, which the United States frequently brings into a taxing district to be used in manufacture. The exemption of such properties from taxation does not impair the local resources, since only the action of the Federal Government has brought them within the local taxing jurisdiction. On the contrary, to permit taxability would allow the states and the localities to increase their tax revenues at the expense of the United States, and to gain by the war necessities of the nation. The substantiality of this additional burden is indicated by the fact that of over seven billion dollars spent by the Defense Plant Corporation approximately four billion was invested in machinery.[1] The object of the waiver for real property was primarily to protect the localities against loss, not to enable them to take advantage of the national emergency—or indeed, apart from any emergency, to enable them to enlarge their taxable resources because of federal activities.

[1] This information has been obtained from the statistical department of the Reconstruction Finance Corporation.

Another factor differentiating portable machinery from land and buildings is the possibility of multiple taxation. As the record in this case demonstrates, machines are frequently moved from plant to plant. This might, in the absence of a uniform tax day, subject the same machinery to taxation in several jurisdictions. Limitation of the waiver to real property in itself indicates that Congress did not intend to permit any such burdensome result.

It is, of course, true that the waiver for real property permits the states to tax buildings newly constructed on federal land as well as the land itself, and that to this extent they gain from the Federal program. But land and buildings are almost uniformly regarded as real property, and the buildings, of course, are taxable only in a single district. The unquestionable legislative intention to include buildings within the waiver does not warrant a further enlargement of the class of taxable property, in a manner inconsistent with the underlying purpose of the waiver.

C. THE COMMON LAW MEANING OF "REAL PROPERTY"

For the reasons stated, we believe that the history of the statute and its purposes show that Congress intended the waiver of tax exemption for "real property" to extend only to land and buildings (including those appurtenances which are integral parts of buildings). It is also appropri-

ate, of course, to consider the normal meaning of the phrase "real property" as used in this country, inasmuch as Congress presumably legislated with that in mind.[12] We may say in advance that the court below was totally incorrect in holding that if such a test were applied the "majority rule" would treat machinery such as is involved here as real property. In our opinion, such a result could be reached only by five states other than Pennsylvania, because of unusual statutory definitions which do not apply the common law test, and in four of these states other statutory provisions exclude the property of the United States. See pp. 38–47, *infra*.

Lands and buildings, and the integral parts of buildings (whether movable or not) such as bricks, doors, windows and even keys, are uniformly regarded as real property, except where it appears that a building is not intended to be affixed to the land as a permanent structure.[13]

The problem becomes more complex when we go beyond such relatively simple situations. Courts have frequently explicitly noted the "great confu-

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[12] See the statement by Representative Wolcott, *supra*, p. 23, that the controlling factor in all the states was the intention with which the annexation was made.

[13] E. g., *Van Ness* v. *Pacard*, 2 Pet. 137; *Kinkead* v. *United States*, 150 U. S. 483, 491; 1 Thompson, *Real Property* (Perm. Ed. 1939), §§ 176, 210; Devlin, *Real Property & Deeds* (3d Ed. 1911), § 1220a; 22 Am. Jur. 778, 785.

sion" in the law of fixtures.[14] The tests that are applied, however, are substantially alike in the various states and the confusion results largely from the application of the tests to varying factual situations.

The courts almost uniformly agree that the following three factors are to be taken into consideration in determining whether a particular chattel has become real property: (1) the degree and method of annexation to the realty; (2) the appropriation, adaptation, or application to the use or purpose of the property with which the chattel is connected; and (3) the intention of the party making the annexation that it be a permanent accession to the freehold.[15]

Originally the first of these factors, annexation, was regarded as the most important.[16] The later cases, however, treat the intention of the parties

[14] Ewell, *Fixtures* (2d Ed. 1905) pp. 13–14; Thompson, *supra*, § 160; *Frost* v. *Schinkel*, 121 Neb. 784, 791; 238 N. W. 659, 663, 77 A. L. R. 1381, 1386; *Teaff* v. *Hewitt*, 1 Ohio St. 511, 523, each of which reviews the pertinent authorities. *Teaff* v. *Hewitt* is generally regarded as the leading American case on the subject of fixtures, and, despite its age, would still seem to contain the best reasoned analysis of the subject. The case deals with machinery similar to that involved in the case at bar.

[15] *Ibid.*; Thompson, *supra*, § 162; 2 Tiffany, *Real Property* (3rd ed. 1939) § 607; 1 Jones, *Mortgages* (8th ed. 1928), §§ 531–532; Ewell, *Fixtures*, pp. 27–28; Devlin, *Real Property & Deeds*, supra, § 1211.

[16] Thompson, *supra*, § 166; Ewell, *supra*, p. 14.

as the controlling criterion, with the other factors relevant to the extent that they manifest intention.[17] The intent must not be secret, of course; it is usually inferred from the other circumstances of the attachment.[18] But when the parties state their intention specifically, as by agreement, that will normally be controlling, unless other factors plainly show that the affixation is meant

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[17] Tiffany, *supra*, §§ 607–608; Thompson, *supra*, § 163; Jones, *supra*, §§ 531–532; Ewell, *supra*, pp. 30–31; *Teaff* v. *Hewitt*, *supra*, and cases cited *infra*, note 41, p. 40. Tiffany, citing decisions from 28 States, states that (§ 607): "The later cases usually regard the consideration of intention, as, in theory, the controlling one, referring to the mode of annexation and the character of the article merely as evidence upon the question of intention."

The prevailing rule is accurately and ably summarized in a recent Indiana decision (*Citizens Bank* v. *Mergenthaler Linotype Co.*, 216 Ind. 573, 581, 25 N. E. 2d 444) as follows:

"* * * The third test which concerns the intention to make or not make an article a permanent accession of the freehold is of controlling importance. The first two tests derive their chief value as evidence of such intention. The third test is made the controlling criterion by the great weight of authority, and is considered the chief test. For a chattel to be converted into a fixture the intention to make it a permanent accession must affirmatively appear. If there is any doubt of such intention, the chattel does not lose its personal property characteristics. The intention that the article shall remain personalty will be determined from the conduct, action, purpose, and relation of the parties. The intention of the parties is not always governed by what is said by them, but the intention may be determined from the nature of the article, relation and situation of the parties making the annexation, and the structure, use, and mode of annexation."

[18] Tiffany, *supra*, § 608; Thompson, *supra*, §§ 164–165.

to be permanent or unless the removal of the chattel would cause serious physical injury either to the remaining property or to the chattel itself."

There is disagreement as to the meaning of the second factor, which many courts treat as very important in the absence of any other clear manifestation of intention. Some courts, including Pennsylvania, hold a chattel "appropriate to the use of the realty" if it is a necessary part of the equipment for the business being conducted on the property.[29] But the courts generally require that

[28] Tiffany, Real Property (3d ed. 1939) § 605; 1 Thompson, *supra*, §§ 182–183; 1 Jones, *Mortgages* (8th ed. 1928) § 542; *Holt* v. *Henley*, 232 U. S. 637; *National Bank of the Republic* v. *Wells-Jackson Corp.*, 358 Ill. 356, 193 N. E. 215. An agreement may also not be binding on third parties not put on notice. Thompson, § 184; Annotation, 58 A. L. R. 1352.

[29] *E. G., Ottumwa Woolen Mill Co.* v. *Hawley*, 44 Iowa 57; *Lyle* v. *Palmer*, 42 Mich. 314, 3 N. W. 921; *Knickerbocker Trust Co.* v. *Penn Cordage Co.*, 66 N. J. Eq. 305, 58 Atl. 409, and Pennsylvania cases cited at R. 84. As to this method of defining the criterion, Tiffany states (§ 610) p. 574:

"* * * The practical efficiency of such a criterion of a fixture may well be questioned. It would but rarely occur that an article attached to land is used otherwise than in furtherance of the purpose for which the land is used. * * *".

As early as 1853 the Pennsylvania rule was criticized by Chief Justice Bartley in *Teaff* v. *Hewitt* (1 Ohio St. at 538–9), as follows:

"To what consequences would such a criterion lead, if fully carried out? A cabinet maker erects a building for a cabinet shop, and furnishes it with all the necessary machinery, implements, tools, etc., for an establishment for the manufacture of furniture, some of which may be attached to the build-

the chattel be peculiarly appropriate to the use to which the land is adapted, so that machinery installed in and adapted to a special type of factory building might be treated as realty while machinery installed in a building suitable for other types of activities, and which is not essential to the usefulness of the land is not.[21] But with few exceptions, even the courts adopting the first of

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ing. All the machinery, tools, implements, etc., whether actually attached to the building or not, and essential and necessary for the business of the establishment to which the building is adapted, and without which, it would not be a perfect and complete establishment of the kind, would be parcel of the freehold. The application of the same rule would convert the benches and essential implements of the shoemaker's shop, the vices, hammers and machinery of the coppersmith and tinner, and of other mechanics and manufacturers, into realty. And inasmuch as some carry on their business on a much larger scale than others, a question of no little difficulty would arise as to the quantity of the loose implements and machinery, which should be deemed essential to make it a complete establishment, and what might be rejected as unessential, and therefore chattels.

"It may be inconvenient to the mechanic or the manufacturer to have the movable implements and machinery in his shop taken away upon execution. The same inconvenience however, may be experienced by the agriculturist who may be prevented from putting in his crops by a similar removal of his team or farming utensils.

"Several decisions have been subsequently made in Pennsylvania, and also, in some of the other States, recognizing the doctrine of the case of *Voorhis* v. *Freeman*, but the great weight of authority both in England and in the United States, is against it."

[21] Tiffany, *supra*, § 610; Devlin, *supra*, § 1214; Jones, *supra*, § 554; *Tyaff* v. *Hewitt*, *supra*, note 20; *Hill* v. *National Bank*, 97 U. S. 450; *Hubbell* v. *East Cambridge Bank*, 132 Mass.

these interpretations of the second factor regard it as subordinate to any definite manifestation of intention that the accession is or is not intended to be permanent.[22] For the ultimate basis of the entire doctrine of fixtures rests upon the notion that the chattel has been permanently affixed to the realty.

The indefiniteness in application of the generally accepted formula is enhanced by an additional element putting across the subject. The weight given to the factors described above, and the burden of sustaining a claim depend on the relation between the parties—whether the contest is between owner and trespasser, vendor and vendee, heir or devisee and personal representative, conditional vendor of the chattel and owner or mortgage, mortgagor or mortgagee, or landlord and tenant.[23] To illustrate, articles attached to

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447; *Neufelder* v. *Third Street & Suburban R. Co.*, 23 Wash. 479, 63 Pac. 197. Jones, *supra*, states (§ 554) p. 727:

"Of the other class are movable machines used in a mill adapted to various kinds of business, which may be wholly set aside, and still the value and usefulness of the mill property would not be materially impaired. Such machinery, not being indispensable to the enjoyment of the realty, is generally considered not to be a part of it, and not to pass by a mortgage of it."

[22] *Ottumwa Woolen Mill Co.* v. *Hawley*, 44 Iowa 57; *Parsons* v. *Copeland*, 38 Me. 537, which are perhaps the leading authorities outside of Pennsylvania for this doctrine; Jones, *supra*, § 554, p. 729.

[23] Tiffany, *supra*, § 611; *Van Veis* v. *Pacard*, 2 Pet. 137; *Dudley* v. *Hurst*, 67 Md. 44, 8 Atl. 901; Thompson, *supra*, § 161.

land by the owner, or under a mortgage, might be treated as realty, while the same attachments by a tenant would remain a chattel.[24] But as the Supreme Court of Ohio explained in *Teaff* v. *Hewitt, supra*, these differences in result are not inconsistent, but reflect the intention of the parties, which varies with the relationship.[25] A tenant, for example, would be less likely to intend that his installation be permanent than an owner or mortgagor.[26]

As might be anticipated, the application of these general principles has resulted in considerable divergence in the treatment of machinery, each decision depending largely on the facts of the particular case, with special reference to the relationship between the parties.[27] Some courts still emphasize the method of attachment and hold machinery not to be a fixture if it is easily removable.[28] The Pennsylvania Supreme Court is probably correct, however, in concluding (R. 85–86) that the majority of the courts hold:

> * * *, the attachment to the land may be constructive and need not be physical

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[24] *Van Ness* v. *Pacard, supra; Kinkead* v. *United States*, 150 U. S. 483, 491.

[25] See *Teaff* v. *Hewitt*, 1 Ohio St. at 530; Tiffany, *supra*, § 611.

[26] Tiffany, *supra*, § 617.

[27] Tiffany, *supra*, § 610; Jones, *supra*, §§ 554–561; Thompson, *supra*, § 220; Devlin, *supra*, §§ 1208–1215.

[28] *Hill* v. *Wentworth*, 28 Vt. 428; *Bartlett* v. *Wood*, 32 Vt. 372; Tiffany, *supra*, § 609, p. 570 and cases cited; Devlin, *supra*, § 1209.

to the extent that removal will result in serious damage to the remaining freehold.

In particular, many cases hold that small, portable parts of heavier attachments which are unquestionably fixtures necessarily share that status.[29]

But that by no means disposes of the present case, as the court below seemed to assume. Even though a machine which can be removed without physical injury is not thereby precluded from being treated as a fixture, it does not follow that all machinery thereby becomes real property. Indeed, the general rule is, if anything, to the contrary. See pp. 29–33, *supra*. If we assume that machinery is necessary to the business being conducted on the property, and that accordingly the second requisite is fulfilled in the states construing that factor most broadly, there still remains to be considered the element of intention. In substantially all of the states an intention that machinery not be a permanent accession, whether manifested by explicit statement or by other facts (of which easy removability is one), will still be recognized

[29] *Southern Cotton Oil Co.* v. *Lowery*, 231 Ala. 119, 163 So. 629; *Fechet* v. *Drake*, 2 Ariz. 239, 12 Pac. 694; *Atlantic Refining Co.* v. *Feinberg*, 31 Del. 183, 112 Atl. 685; *J. & H. Day Co.* v. *Public Sav. Ins. Co.*, 85 Ind. App. 78, 151 N. E. 361; *Dudley* v. *Hurst*, 67 Md. 41, 8 Atl. 901; *Anderson* v. *Perpetual B. & L. Association*, 172 Md. 94, 190 Atl. 747; *Thomsen* v. *Cullen*, 196 Wis. 581, 219 N. W. 439.

as controlling.[30] The states differ to some extent in the emphasis placed upon other factors when intention is not clearly shown, not upon the significance of manifested intention.[31] Indeed, many Pennsylvania decisions which do not appear to have been overruled, and some of which are cited with approval by the court below (R. 84 (n)), do not disregard the intention of the parties as a factor to be considered.[32] A series of decisions in the Federal courts in that State purport to summarize the state law—perhaps inaccurately in view of the decision below, but certainly with ample support in the Pennsylvania authorities—as establishing a presumption that machinery indispensable to the operation of a plant is intended to be permanent, with the presumption rebuttable by a

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[30] See notes 15, 17, 19, 25, supra, pp. 29-31, 34, and notes 41, 42, *infra*, pp. 40-41. For Federal cases see *Willis* v. *Beeler*, 90 F. 2d 538 (C. C. A. 6); *Petition of Johns-Manville Sales Corp.*, 88 F. 2d 520 (C. C. A. 6); *In re Voight-Prost Brewing Co.*, 115 F. 2d 733 (C. C. A. 6); *In re Theo. A. Kochs Co.*, 120 F. 2d 803 (C. C. A. 7); *Bergh* v. *Herring-Hall-Marvin Safe Co.*, 136 Fed. 368 (C. C. A. 2); *Brown* v. *Reno Electric Light & Power Co.*, 55 Fed. 229 (C. C., Nev.); *W. U. Tel. Co.* v. *Burlington & S. W. Ry. Co.*, 11 Fed. 1, 7 (C. C. Iowa) and cases cited in note 33, p. 37, *infra*.

[31] Cf. *Ottumwa Woolen Mill Co.* v. *Hawley*, *supra*; *Thomsen* v. *Cullen*, *supra*, with *Hubbell* v. *East Cambridge Bank*, 132 Mass. 447; *McRea* v. *Central Nat. Bk.*, 66 N. Y. 489; *Teaff* v. *Hewitt*, 1 Ohio St. 511; Thompson, § 220, pp. 366-367.

[32] *Hill* v. *Seward*, 53 Pa. 271; *Vail* v. *Weaver*, 132 Pa. 363, 19 Atl. 138; *Donnelly* v. *Frick & Lindsay Co.*, 207 Pa. 597, 57 Atl. 60; *Wickes Bros.* v. *Island Park Association*, 229 Pa. 400, 78 Atl. 934; *McClintock & I. Co.* v. *Aetna Explosives Co.*, 260 Pa. 191, 103 Atl. 622; *American Laundry*

showing of a contrary intention unless the plant is usable only for the single purpose.[33] In *McConnell* v. *Chelton Trust Co.*, 282 Fed. 105, the Circuit Court of Appeals for the Third Circuit had held that machinery for the manufacture of war munitions installed in a plant previously and still in part devoted to manufacturing printing press machinery was not real property because not intended to be permanently installed; the case was subsequently distinguished on the ground of lack of permanence, but was not disapproved, in one of the leading Pennsylvania authorities cited by the court below.[34]

We have analyzed the Pennsylvania authorities not for the purpose of challenging the Pennsylvania Supreme Court on the law of that State,

Mach. Co. v. *Miners' Trust Co.*, 307 Pa. 395, 161 Atl. 306; *Clayton* v. *Lienhard*, 312 Pa. 433, 437, 167 Atl. 321 and cases cited; *Ross* v. *Fairy Silk Mills*, 334 Pa. 305, 310-311, 5 A. 2d 569; *Commonwealth Trust Co.* v. *Harkins*, 312 Pa. 402, 408, 167 Atl. 278; *Pennsylvania Chocolate Co.* v. *Hershey Bros.*, 316 Pa. 292, 296-297, 175 Atl. 694. See Notes, 87 Univ. of Pa. L. Rev. 995 (1939), and 90 *Id.* 77 (1941), for discussions of the Pennsylvania law. The note last cited stated (p. 82) that "in accord with the majority of American jurisdictions the Pennsylvania court uses the 'intention' test as the criterion of a fixture."

[33] *In re Highland Silk Co.*, 41 F. 2d 404 (E. D. Pa.); *In re Highland Silk Co.*, 41 F. 2d 405 (C. C. A. 3); *Union Building Co.* v. *Pennell*, 78 F. 2d 959, 965-966 (C. C. A. 3); *Kennedy* v. *Crumlish*, 85 F. 2d 665 (C. C. A. 3); *In re American Pile Fabrics Co.*, 85 F. 2d 961 (C. C. A. 3).

[34] *Pennsylvania Chocolate Co.* v. *Hershey Bros.*, 316 Pa. 292, 299, 175 Atl. 694.

but in order to show that Congress would not have been forewarned that Pennsylvania law was as different from that of the other states as it now appears to be. Under the present decision the entire determination as to whether a machine is real property rests on its usefulness to the enterprise carried on in a plant, a test which would invariably convert all machinery into realty. Although only the method of annexation (the first factor) has been explicitly discarded as a test by the Pennsylvania court, the opinion also completely ignores the third factor, the clearly manifested intention of the parties, and accordingly would seem to treat that factor too as irrelevant.

We know of no other state which so completely departs from the general rule for determining whether particular chattels become part of the realty. It is impossible, of course, to read all of the mass of cases on fixtures in the 48 States. In addition to our study of leading cases and recognized works on the subject, we have examined the 29 cases cited by the Pennsylvania Supreme Court (R. 86) in support of its statement (R. 86, 88) that its position was in accord with that of the majority of States. We think it fair to use these cases to test the proposition, although the selection by the Pennsylvania court does not purport to list the leading authorities taking a different

position, and accordingly cannot be regarded as a typical sampling of the cases.[35]

Many of these cases do hold that the method of annexation to the realty is not controlling.[36] But in a large number of them the same result would have been reached on any theory, either because the machinery involved could not easily be removed,[37] or because the case concerned the portable parts of securely attached structures,[38] or because the machines were specially fitted to the particular use for which the building was

[35] The Pennsylvania court cites Ohio as illustrative of the rule that "only 'slight' attachment is required" (R. 86), and refers to *Holland Furnace Co.* v. *Trumbull Sav. & Loan Co.*, 135 Ohio St. 18, 19 N. E. 2d 273, which involved a furnace in a residence. But since *Teaff* v. *Hewitt*, 1 Ohio St. 511 (1853), *supra*, pp. 31-32n, Ohio has expressly refused to follow the Pennsylvania doctrine. For the most recent cases, which involve the taxation of machinery, see: *Zangerle* v. *Standard Oil Co.*, 144 Ohio St. 506, 60 N. E. 2d 52; *Standard Oil Co.* v. *Zangerle*, 144 Ohio St. 523, 60 N. E. 2d 59; *Zangerle* v. *Republic Steel Corp.*, 144 Ohio St. 529, 60 N. E. 2d 170.

[36] E. g. *Ottumwa Woolen Mill Co.* v. *Hawley*, 44 Iowa 57; *Cary Hardware Co.* v. *McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Metropolitan Life Ins. Co.* v. *Jensen*, 9 N. W. 2d 140 (S. D.); *Parsons* v. *Copeland*, 38 Me. 537, *Commercial Fin. Co.* v. *Brooksville Hotel Co.*, 98 Fla. 410, 123 So. 844; *Merchants' National Bank* v. *Stanton*, 55 Minn. 211, 56 N. W. 821; *Dudley* v. *Hurst*, 67 Md. 44, 8 Atl. 901; *Anderson* v. *Perpetual B. & L. Ass'n.*, 172 Md. 94, 190 Atl. 747.

[37] *Southern Cotton Oil Co.* v. *Lowery*, 231 Ala. 119, 163 So. 629; *Fechet* v. *Drake*, 2 Ariz. 239, 12 Pac. 694; *Atlantic Refining Co.* v. *Feinberg*, 31 Del. 183, 112 Atl. 685; *J. & H. Day Co.* v. *Public Sav. Ins. Co.*, 85 Ind. App. 78, 151 N. E. 361; *Thomson* v. *Cullen*, 196 Wis. 581, 219 N. W. 439; *Dudley* v. *Hurst*, 67 Md. 44, 8 Atl. 901; *Anderson* v. *Perpetual B. & L. Ass'n.*, 172 Md. 94, 190 Atl. 747.

adapted [39] or because intent was otherwise clearly shown."[40]

The opinions in 27 of the 29 cases definitely indicate that the intention of the parties is the controlling, or at least an important, criterion.[41]

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[39] *Fechet* v. *Drake*, 2 Ariz. 239, 12 Pac. 694; *Humes* v. *Higman*, 145 Ala. 215, 40 So. 128; *J. & H. Day Co.* v. *Public Sav. Ins. Co.*, 85 Ind. App. 78, 151 N. E. 361; *Green* v. *Chicago R. I. & P. R. R.*, 8 Kan. App. 611; *Cunningham* v. *Cureton*, 96 Ga. 489, 23 S. E. 420; *Parsons* v. *Copeland*, 38 Me. 537; *Metropolitan Life Ins. Co.* v. *Kimball*, 163 Ore. 31, 94 P. 2d 1101; *McRea* v. *Central Nat. Bk.*, 66 N. Y. 489.

[40] *Atlantic Refining Co.* v. *Feinberg*, 31 Del. 183, 112 Atl. 685; *Seedhouse* v. *Broward*, 34 Fla. 509, 16 So. 425; *Southbridge Sav. Bank* v. *Mason*, 147 Mass. 500, 18 N. E. 406; *Commercial Credit Corp.* v. *Commonwealth Mortgage Co.*, 276 Mass. 335, 177 N. E. 88; *McRea* v. *Central Nat. Bk.*, 66 N. Y. 489; *Pocahontas Coal & Coke Co.* v. *By-Products Pocahontas Co.*, 112 W. Va. 390, 164 S. E. 504; *Metropolitan Life Ins. Co.* v. *Kimball*, 163 Ore. 31, 94 P. 2d 1101.

[41] *Humes* v. *Higman*, 145 Ala. 215, 40 So. 128; *Southern Cotton Oil Co.* v. *Lowery*, 231 Ala. 119, 163 So. 629; *Fechet* v. *Drake*, 2 Ariz. 239, 12 Pac. 694; *Teater* v. *Good Hope Development Corp.*, 14 Cal. 2d 196, 93 P. 2d 112; *Cary Hardware Co.* v. *McCarty*, 40 Colo. App. 200, 50 Pac. 744; *Atlantic Refining Co.* v. *Feinberg*, 31 Del. 183, 112 Atl. 685; *Commercial Fin. Co.* v. *Brooksville Hotel Co.*, 98 Fla. 410, 123 So. 814; *Seedhouse* v. *Broward*, 34 Fla. 509, 16 So. 425; *Cunningham* v. *Cureton*, 96 Ga. 489, 23 S. E. 420; *J. & H. Day Co.* v. *Public Sav. Ins. Co.*, 85 Ind. App. 78, 151 N. E. 361; *Ottumwa Woolen Mill Co.* v. *Hawley*, 44 Iowa 57; *Parsons* v. *Copeland*, 38 Me. 537; *Dudley* v. *Hurst*, 67 Md. 44, 8 Atl. 901; *Anderson* v. *Perpetual B. & L. Assn.*, 172 Md. 94, 190 Atl. 747; *Southbridge Sav. Bank* v. *Mason*, 147 Mass. 500, 18 N. E. 406; *Commercial Credit Corp.* v. *Commonwealth Mortgage Co.*, 276 Mass. 335, 177 N. E. 88; *Detroit Trust Co.* v. *Detroit City Service Co.*, 262 Mich. 14, 247 N. W. 76; *Merchants' National Bank* v. *Stanton*, 55 Minn. 211, 218, 56 N. W. 821; *Planters Mfg. Co.* v. *Greenwood Agency*, 168 Miss. 892,

And where this does not appear clearly in the particular case cited, other decisions in the same State show adherence to the general rule in this respect.[12] None of the jurisdictions referred to by the Pennsylvania court support it in rejecting as irrelevant all manifestations of intention that the machines were not to be permanently affixed, or in giving consideration exclusively to the usefulness of the machines to the business enter-

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152 So. 476; *Knickerbocker Trust Co.* v. *Penn Cordage Co.*, 66 N. J. Eq. 305, 58 Atl. 409; *McRea* v. *Central Nat. Bk.*, 66 N. Y. 489; *Foote* v. *Gooch*, 96 N. C. 265, 1 S. E. 525; *Metropolitan Life Ins. Co.* v. *Kimball*, 163 Ore. 31, 94 P. 2d 1101; *Metropolitan Life Ins. Co.* v. *Jensen*, 9 N. W. 2d 140 (S. D.); *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 16 S. E. 2d 345; *Pocahontas Coal & Coke Co.* v. *By-Products Pocahontas Co.*, 112 W. Va. 390, 164 S. E. 504; *Thomsen* v. *Cullen*, 196 Wis. 581, 219 N. W. 439.

[12] The two cases out of the 29 which do not appear to recognize the importance of intention are early Kansas and Michigan decisions. For subsequent cases in those states applying the general rule, see *Bromick* v. *Burkholder*, 98 Kan. 261, 158 Pac. 63; *L. & M. Mercantile Co.* v. *Wimer*, 94 Kan. 573, 577, 146 Pac. 1162; *Colton* v. *Michigan Lafayette Building Co.*, 267 Mich. 122, 255 N. W. 433; *Sequist* v. *Fabiano*, 274 Mich. 643, 265 N. W. 488. For cases in other states included in the Pennsylvania Supreme Court's list, see: *Southern Cal. Tel. Co.* v. *State Board*, 12 Cal. 2d 127, 131–135, 82 P. 2d 422; *Bank of America National Association* v. *LaReine Hotel Corp.*, 108 N. J. Eq. 567; *Newark* v. *Weyerhaeuser Timber Co.*, 18 N. J. M. 560 (St. Bd. Tax App.); *Citizens Bank* v. *Mergenthaler Linotype Co.*, 216 Ind. 573, 25 N. E. 2d 444; *Nigro* v. *Hatch*, 2 Ariz. 144; *Love* v. *Union Central Life Insurance Co.*, 168 Miss. 408, 150 So. 794. In addition, for New Hampshire, which is usually cited as adopting the Pennsylvania rule, see *Graton & Knight Mfg. Co.* v. *Woodworth-Mason Co.*, 69 N. H. 177; *Langdon* v. *Buchanan*, 62 N. H. 657.

prise. And it is to be remembered that at least one member of the House Committee specifically adverted to intent as the controlling factor. See p. 23, *supra*.

There can, we think, be no question as to the proper decision in this case, if any of the standard tests for determining the status of fixtures be applied. Appellant's machinery, although necessary to the manufacture of airplane propellers, was not firmly fastened to the building but was easily removable, without injury to either the machinery or the plant. Although this is not by any means controlling, it is a factor to be taken into consideration. Even apart from the provision in the lease which specifically states that the machinery shall remain personalty (R. 14, *supra*, pp. 8–9), which ordinarily would be conclusive, the lease itself shows that the parties contemplated that the machinery was not to be a permanent accession to the realty, for it expressly authorizes the lessee to use the machines in other plants and to lend them to other suppliers (R. 18–19). The manner in which the plant was operated further demonstrates that both as a matter of intention and in fact the machines were not a part of the realty. This appears from the fact that machines were constantly being moved in and out, rearranged, replaced and transferred to other plants without injury to themselves or the building.

Under the interpretation of the second factor as including as fixtures only machines necessary to the use to which the land and building is specially adapted, the same result would be reached, for this machinery was not peculiarly adapted for this building. The building could (R. 37):

> * * * do almost any manufacturing type of job which has to be done, excepting something that requires a special type of building. * * *

And the machines were attached by simple plugged-in electrical connections in order that the flexibility necessary to "keep up with changes and developments" in propeller manufacturing would not be impeded (R. 35). Thus, only under the interpretation of the second factor as covering all machinery necessary to the operation of a business in a plant would any one of the three factors suggest that the machinery here was a fixture. And the cases giving effect to that factor almost uniformly—outside of Pennsylvania at the present time—recognize that any contrary manifestation of intention, such as clearly appears here, would be controlling.[43]

Up to this point we have discussed the subject of fixtures generally without reference to the tax laws of the various states, although we recognize that this is a tax case. We have adopted that

[43] See notes 22, 30, 31, pp. 33, 36, *supra*.

course because the relatively few "tax cases apply the standard formula, and because Congress presumably used the term "real property" in its customary sense and was not merely as it might be employed in state tax cases.

It is true that almost every state has a statute defining "real property" or "real estate" for purposes of taxation.[45] But in 31 of the states the statutory definition merely expresses the common law rule for determining what chattels are to be treated as real property.[46] Typical statutes define real property as including "lands, tenements and hereditaments";[47] lands, "buildings, structures

[44] The paucity of tax cases may be explained by the fact that in the many states in which real and personal property are taxed alike, it is of no consequence where the line is drawn between them.

[45] Wyoming has no definition. See Wyo. Rev. Stat. 1931, § 115–108. Mississippi merely defines lands as including "all corporeal hereditaments whatever or any interest therein." Miss. Code Ann. (1942), § 677. Arizona declares that real estate shall mean and include "the ownership of, or claim to, or possession of, or right of possession to, any land or patented mine," and that "real estate and the improvements thereon shall be assessed separately." Ariz. Code Ann. (1939) § 73–202. The statutes in the other states are more specific.

[46] In addition to the statutes cited in notes 47–51, *infra*, see Ky. Rev. Stat. 1942, § 134.010 (lands and improvements).

[47] Alabama Code of 1940, Title 1, § 2; Rev. Code of Delaware 1935, c. 1, § 1; N. J. Rev. Stat. 1937, Title 1, c. 1, § 1:1–2; New Mexico Stat. Ann. 1941, § 75–101; Michie's Tenn. Code of 1938, § 15; West Virginia Code of 1943, Ann., § 33 (p).

and improvements, and other fixtures,"[48] lands and buildings or structures,[49] or lands, buildings and fixtures.[50] Some of the statutes which in substance do no more than reaffirm the common law test specifically refer to the necessity of "permanent" attachment.[51] We do not read these variations in phraseology as establishing different tests, or as departing from the common law doctrine, and the courts have not so treated them. The courts, in construing these statutes, have sometimes held machinery to be real property and sometimes not, but the decisions apply the accepted rules, and give controlling weight to those factors indicating that the machine was or was

[48] Arkansas—Pope's Digest 1937, § 13358; Colorado Stat. Ann. 1935, c. 142, § 17; Florida Stat. 1941, § 192.02; Idaho Code Ann. 1932, §§ 61–108, 110; Kansas Gen. Stat. 1935, c. 79, §§ 79–102; Mason's Minnesota Stat. 1927, § 1977; Montana Rev. Code 1935, c. 182, § 1996; Nebraska Comp. Stat. 1929, c. 77, § 102; Page's Ann. Ohio Gen. Code, § 5322; Vernon's Texas Civ. Stat. Art. 7146; Utah Code Ann. 1943, § 80-3-1; Remington's Rev. Stat. Wash. Ann., § 11108; Wisconsin Stat. 1943, § 70.03.

[49] Maine Rev. Stat. 1944, c. 81, § 3; S. C. Code of Laws 1942, § 2577; Louisiana Gen. Stat. 1939, § 8200.

[50] Burns Rev. Indiana Stat. 1933, § 64–104; Mass. Gen. Laws 1932, c. 59, § 3; Michigan Stat. Ann. 1935, Title 7, § 7.2.

[51] Deering's California Codes (Revenue and Taxation) §§ 104–5; Illinois Rev. Stat. 1944, c. 120, § 42 (10); North Carolina Code of 1939, § 7971 (105) (30); North Dakota Revised Code of 1943, §§ 57-0204, 47-0104; South Dakota Code 1939, §§ 57.0312, 51.0104.

not intended to be a permanent accession to the land.[52]

In 15 states the statutes are specific as to whether machinery is to be subject to the real property tax. In Georgia, Maryland, Minnesota, Nevada, New York, Oklahoma and Virginia movable machinery is expressly classified separately from realty.[53] In Rhode Island and Vermont engines and machines furnishing heat and motive power are treated as real estate while other types of machinery are taxable as personal property.[54] In Iowa, Missouri, New Hampshire, Connecticut, Oregon and parts of Pennsylvania (by judicial interpretation) machinery is declared to be subject to the real prop-

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[52] *Newport News* v. *Warwick County*, 159 Va. 571, 603–4, 166 S. E. 570; *Southern Cal. Tel. Co.* v. *State Board*, 12 Cal. 2d 127, 134–5, 82 P. 2d 422; *Zangerle* v. *Standard Oil Co.*, 141 Ohio St. 506, 69 N. E. 2d 52; *Standard Oil Co.* v. *Zangerle*, 141 Ohio St. 523, 60 N. E. 2d 59; *Zangerle* v. *Republic Steel Corp.* 141 Ohio St. 529, 60 N. E. 2d 170; *State ex rel Gisholt M. Co.* v. *Norsing*, 168 Wis. 442, 169 N. W. 429; *State* v. *Bodden*, 172 Wis. 64, 178 N. W. 242; *Newark* v. *Weyerhaeuser Timber Co.*, 18 N. J. M. 360, 561–565 (St. Bd. Tax App.); *Newport Illuminating Co.* v. *Assessors*, 19 R. I. 632, 36 Atl. 426; *Detroit United Ry.* v. *State Tax Com'rs*, 136 Mich. 96, 103, 98 N. W. 997; cf. *Patterson* v. *Delaware County*, 70 Pa. 381.

[53] Georgia Code 1933, Title 85, §§ 201, 405, 1701; Maryland Code 1939, Art. 81, §§ 1 (12), 7 (23); Laws of Minnesota, 1943, c. 472; Nevada Comp. Laws Supp. 1931–1941, § 6419; N. Y. Cons. Laws (Tax Law), §§ 2, 3, 219L; Oklahoma Stat. 1941, Title 68, § 15.3; Virginia Code Ann. 1942, App. (Tax Code) § 73.

[54] Rhode Island Gen. Laws, c. 309, § 9; Vermont Pub. Laws 1933, §§ 32, 584, 586, 29, 611.

city tax,[55] although a 1943 Iowa statute expressly excepts machinery owned by the United States,[56] Missouri excepts "lands the property of the United States;"[57] Connecticut "property belonging to * * * the United States,"[58] and New Hampshire "real estate of the United States * * * used for public purposes."[59] Indeed, it should be noted that as of April 1, 1943, 40 states exempted the property of the United States from taxation.[60]

It thus appears that for purposes of taxation as well as generally, the court below was clearly wrong in concluding that the majority of states

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[55] Iowa Code 1939, § 6977; Missouri Rev. Stat. 1939, § 11211; New Hampshire Rev. Laws of 1942, c. 73, §§ 7, 8, 9; Conn. Gen. Stat. Supp. 1934–1935; § 30fe; Oregon Comp. Laws Ann. 1940, Title 110, § 102; Purdon's Pennsylvania Stat. Ann., Title 72, § 5020–201.

[56] Iowa Acts 1943, c. 210, which reads as follows: "The exemption herein provided shall not include any real property subject to taxation under any federal statute applicable thereto, but such exemption shall extend to and include all machinery and equipment owned exclusively by the United States or any corporate agency or instrumentality thereof without regard to the manner of the affixation of such machinery and equipment to the land or building upon or in which such property is located, until such time as the Congress of the United States shall expressly authorize the taxation of such machinery and equipment."

[57] Mo. Const. 1945, Art. III, § 43 (in 28 Mo. Rev. Ann. Stat. (pocket supp.), p. 25).

[58] Conn. Gen. Stat. 1930, § 1163 (1).

[59] New Hampshire Rev. Laws 1942, c. 73, § 7.

[60] The provisions of the state constitutions and statutes to this effect are collected in the Brief for the United States in *United States* v. *County of Allegheny*, October Term 1943, No. 417, pp. 33–34n.

would hold machinery such as is here involved to be taxable as real property. On the contrary, we believe that the 33 states applying the general rule in tax cases would not come to that conclusion on the facts in this record (which would apply to a major part of the machinery owned by Defense Plant Corporation), inasmuch as the understanding that the machines were not to be permanently affixed is so plainly shown. Only in the five states whose statutes are explicit that machinery is subject to the real property tax and in portions of Pennsylvania could a different result be reached, and in four of the five (Iowa, Missouri, Connecticut and New Hampshire) special statutes preclude the taxing of machinery owned by the United States.[a]

D. THE INTENTION OF CONGRESS AS TO THE MEANING OF "REAL PROPERTY" AND AS TO THE EFFECT TO BE GIVEN LOCAL LAW

We believe that our review of the history of the statute, its objectives, and the accepted meaning of "real property" show what Congress intended by the real property waiver. The history and purpose of the Act strongly suggest that only land and buildings were to be made taxable (pp. 17–27, *supra*); "buildings" would, of course, include such fixtures as are essential to a build-

[a] See notes 56–59, *supra*. In Wisconsin, where machinery has been held taxable as real property (*State ex rel. Gisholt M. Co.* v. *Norsman*, 168 Wis. 442, 169 N. W. 429), a statute excluding "all machinery" but not the "real property" of the United States, has been enacted. Wis. Laws 1943, c. 59, Wis. Stat. 1943, § 70.11 (1a).

ing's operations, such as for example, the heating plant. But if we assume that Congress intended to permit application of the general rule as to when machinery is to be treated as affixed to the realty, the result would be the same.

For portable machines, which can be removed without damage to the lands or buildings, and which, as shown both by express agreement and by the physical facts, were intended from their installation to be transferable to other plants and not to be permanent accessions to the land and building in which they were installed, are not real property under the established and well-recognized principles applied almost universally throughout the country. When Congress used the phrase "real property" it did not have in mind a concept broader than the accepted meaning of the term. Certainly the existence of a few state statutes and decisions classifying machinery with real property for tax purposes does not show a different intention on the part of Congress. States may define terms as they see fit and may tax anything over which they have jurisdiction as real property if they like. Such a classification may mean only that as a matter of policy and convenience a state legislature believes it advisable to impose the same taxes on certain tangible chattels as are imposed on land, not that it regards those chattels as real estate. Nor is the situation any different when a state court construes the words "mill or manufactory"

in a local statute to include all machinery in a plant. A state could, as the Pennsylvania court has in this case, define real property to include electric trucks, or even all motor vehicles used in the operation of a business. But Congress obviously did not mean such departures from the normal standard to determine the scope of the Federal statute.

The considerations discussed indicate not only what Congress meant by real property but also that Congress did not intend the application of the phrase to be dependent upon the law of the state—or in Pennsylvania, of the particular taxing district—in which the land is located. We submit that Congress had its own conception as to what property was being subjected to state taxation. As this Court stated in *Jerome* v. *United States*, 318 U. S. 101, 104:

> At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas* v. *Willcuts*, 296 U. S. 1; *Helvering* v. *Stuart*, 317 U. S. 154, and cases cited. But *we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.* That assumption is based on the fact that the application of federal legislation

> is nationwide (*United States* v. *Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503: * * * [Italics supplied.]

As the *Jerome* case points out, the normal presumption is that Congress intends its laws to operate in a uniform manner throughout the nation, and the burden is on the person who seeks to prove the contrary. In a great many different situations this Court has held that it is up to the Federal courts to define the terms used in Federal statutes, even with respect to expressions having a meaning under local law. *Carpenter* v. *Shaw*, 280 U. S. 363; *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 122–123; *United States* v. *Pelzer*, 312 U. S. 399, 402–403; *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Commissioner* v. *Tower*, No. 317, decided February 25, 1946. *Cf. S. F. A. Inc.* v. *Minnesota*, No. 254, decided March 25, 1946, slip opinion, p. 5; *United States* v. *County of Allegheny*, 322 U. S. 174, at 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447; *Holmberg* v. *Armbrecht*, No. 505, decided February 25, 1946. In *Carpenter* v. *Shaw*, *supra*, the question was whether a state tax on oil and gas royalties was a tax on land or on

personalty. By Federal statute Indian "lands" were to be non-taxable, a situation almost exactly the converse of that here although presenting the same problem. The Court held that it was not bound by the state's characterization of its own tax, saying (280 U. S. at 367–368):

> Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. * * *

The fact that the Federal statute embodies a common law term does not mean that the Court is unable to determine its content independently of the law of the particular state. Most of the above cases fell in that category. The Court will be guided in its determination by all clues to the Congressional intention; if these are not sufficiently clear, and if the phrase employed by Congress has a common law connotation, the Court may "resort to all of the source materials of the common law" in fashioning an answer. See Jackson, J., concurring in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Co.*, 315 U. S. at 469.

Nothing in the background, history or language of the RFC Act rebuts the normal presumption that Section 10 is to be given a uniform nation-wide interpretation irrespective of state law. We do not believe that Congress intended to permit

portable machinery to be exempt from taxation in Pennsylvania cities of the first class,[42] and in Ohio, for example, but to be taxed in other parts of Pennsylvania. If there should be doubts as to the construction of the Act on that score, they should be resolved in favor of tax exemption. For, in addition to the presumption in favor of national uniformity, this Court has stated that a waiver of the tax immunity of the United States "must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption". *Austin* v. *The Aldermen*, 7 Wall. 694, 699. *Cf. Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 99–100.

In support of the contention that state law must govern, appellee has relied on cases in which this Court has held state property law controlling when no Federal statute was in issue. *Waggoner Estate* v. *Wichita County*, 273 U. S. 113; *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. But we are not here concerned with any such proposition. The different considerations governing such cases and those involving federally created rights were recently noted in *Holmberg* v. *Albrecht*, No. 505, decided February 25, 1946. See also *S. R. A. Inc.* v. *Minnesota, supra.*

Reference has also been made to cases in which the lower federal courts have ruled that for pur-

[42] In Pennsylvania cities of the second class, the county may, but the city may not, tax machinery (R. 88).

poses of condemnation "real property" obtains its content by reference to the local law. (*United States* v. *Becktold Co.*, 129 F. 2d 473 (C. C. A. 8); *United States* v. *19.86 Acres*, 141 F. 2d 344 (C. C. A. 7); this Court has made a similar statement in *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 279. But see *United States* v. *Miller*, 317 U. S. 369, 379. Condemnation, however, is a subject as to which the federal courts have traditionally followed the local law in many respects; indeed, it is still the one major field in which the federal courts still adhere to local procedure. See 40 U. S. C. § 258, F. R. C. P. Rule 81 (a) (7). In this setting decisions allowing the local law to govern in condemnation cases do not warrant a similar rule for determining the limits of a Congressional waiver of the federal tax immunity. *Cf. S. R. A. Inc.* v. *Minnesota*, *supra*; *United States* v. *County of Allegheny*, 322 U. S. 174, at 183.

Appellee argues that the words of the Act show that Congress intended that "real property" be given its local connotation in each state or taxing district. Emphasis is placed on the words "any", "to the same extent", and "other" in the clause waiving the Federal exemption. But certainly the phrases "*any* real property" and "*other* real property", whether taken separately or together, do not cast any light on the meaning of "real property", or indicate that it is to be given a special local rather than a uniform national con-

tent. Nor does the fact that the waiver permits federal real property to be taxed "to the same extent according to its value as other real property" do more than provide for parity of treatment between Federal and other realty; it leaves completely open the question as to what constitutes "real property" within the meaning of the waiver. The language in question is the standard formula generally utilized in exemption and exemption waiver provisions for various Federal instrumentalities, and is found alike in provisions which confine the tax privilege to real property and in provisions extending the privilege to both real and personal property. See note 78, p. 20, *supra*.

Appellee also contends that the purpose of the waiver requires that the local law be given effect. The stated purpose is said to be the removal of "the normal immunity of appellant's property from local taxation". (Statement Opposing Jurisdiction, p. 5), and to require Defense Plant to pay its share of the local tax burden. But the object was to abrogate the immunity in order to prevent depletion of local tax revenues; that was the reason for limiting the waiver to real property, as we have shown. See pp. 25–27, *supra*. The existence of such a purpose can hardly be regarded as manifesting a preference for a local determination as to what property is covered by the waiver. To give the local law full sway in defining real property would enable the locality to override

the express Congressional declaration that only real property and not personal property be taxable.

It has been argued that not to follow the local law would, to some extent, require the state courts to look to the meaning of a Federal statute and also might transfer the problem from the state to the Federal courts. Insofar as the states seek to tax property of the Federal Government, it would seem entirely proper for them to look to Federal law, and although there would be the possibility of resort to the Federal courts, no reason has been presented as to why it is objectionable to permit the Federal courts to pass upon the scope of the immunity from taxation of the property of the Federal Government. See *S. R. A. Inc.* v. *Minnesota, supra*, slip sheet pp. 3, 5. That the burden on the Federal courts will not be severe is indicated by the fact that this is the first time in 80 years that any substantial difference of opinion has arisen between a State and the nation as to the meaning of the standard real property exception from the immunity rule. If Pennsylvania's effort to apply its peculiar doctrine is defeated and the principles which seemingly have guided the other states in this field reaffirmed, we doubt that the Federal courts will have any more difficulty in the future on this question than they have had in the past.

Furthermore, even if it be assumed *arguendo* that to some extent Congress may have intended

to let local law govern, we submit that this would be true only within the limits of the normal conception of real property. We doubt that even appellee could seriously contend that if guns or fuel oil or blankets or pencils or feathers or helium were included within a local definition of real property, it would have to be treated as realty under the Federal statute. At most Congress could have intended local law to apply so long as it did not transcend the bounds of the general understanding as to the meaning of real property with which Congress was familiar. The Pennsylvania doctrine applied in this case, whereby neither the method of annexation, nor the intention of the parties—as manifested by acts or by words—nor the frequent removal of the machinery, nor the lack of relationship between the particular machinery and the usefulness of the land and buildings is regarded as relevant, is a wide departure from the accepted definition of realty, and, we submit, not within the limits of the Congressional standard.

Accordingly, we conclude that (1) Congress did not intend the local law to determine the content of the phrase "real property" in the Federal statute, and (2) Whether Congress meant that the waiver of the tax exemption be narrowly confined to lands and buildings, or that fixtures as they have long been known in American law be included, machinery such as is described in the record in this case is not subject to state taxation.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 979

DEFENSE PLANT CORPORATION

Appellant,

vs.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 979

DEFENSE PLANT CORPORATION,

Appellant,

vs.

COUNTY OF BEAVER, PENNSYLVANIA

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, AT No. 201, MARCH TERM, 1944

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now County of Beaver, appellee, and, under the provisions of Rule 12, par. (3), of the Rules of the Court, files the following statement disclosing matters and grounds making against the jurisdiction of this Court asserted by appellant, and includes herein its motion to dismiss or affirm:

(1) The judgment sought to be reviewed in this appeal is one in affirmance of an assessment of appellant's mill or

manufactory located in appellee County. The assessment was made by the proper authority under the provisions of a Pennsylvania Statute (section 201 of the General County Assessment Law of May 22, 1933, P. L. 853; 72 Pardon's Statutes § 5020-201) designating "mills and manufactories of all kinds" as real estate subject to taxation for local purposes and directing their assessment for application thereto of "the annual rate" of local tax levies. The appealed decision is officially reported as *Defense Plant Corporation Tax Assessment Case*, 350 Pa. 520, (Advance Reports of November 24, 1944).

(2) Under the long settled decisional law of the State, a mill or manufactory is an integral unit of real property comprised of land, buildings, and all machinery upon the premises essential to the operation of the mill or manufactory. In its "Statement as to Jurisdiction" filed herein, appellant states (p. 6) that it "has at no time sought to contest this construction by Pennsylvania courts of the Pennsylvania tax law". Pursuant to the State law, appellant's machinery upon the premises of its manufactory and essential to its existence and operation as such was included in the real estate assessment of its manufactory.

(3) Appellant is a government-owned corporate agency or instrumentality of the United States, created or organized by the Reconstruction Finance Corporation under the authority of U. S. C., Title 15, § 606b. All property of such a government-owned corporation is wholly immune from local taxation unless such taxation is permitted by Congress: *Clallam County* v. *United States*, 263 U. S. 341. By the Act of January 22, 1932, c. 8, § 10, 47 Stat. 9, as amended by the Act of June 10, 1941, c. 190, § 3, 55 Stat. 248, (U. S. C. A., Title 15, § 610), Congress legislated upon

the subject. The relevant language of said Act is as follows:

> "The [Defense Plant Corporation], including its franchise, its capital, reserves, and surplus and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. * * * Such exemptions shall also be construed to be applicable to * * * personal property owned by [Defense Plant Corporation] * * *. But such exemptions shall not be construed to be applicable in any state to any buildings which are considered by the laws of such state to be personal property for taxation purposes."

(4) By its assignment of error (1) and that part of assignment (2) which refers to the Constitution of the United States, appellant seeks to invoke the jurisdiction of this Court to obtain a review of the appealed decision as one in favor of the constitutionality of the State law as construed and applied below. Appellee submits that appellant's attempt to invoke this Court's jurisdiction upon such a ground is frivolous—for the reason that the ordinary immunity from local taxation enjoyed by appellant by implication from the Constitution has been made the subject of legislation by Congress, as hereinbefore shown, and that, accordingly, the only possible Federal question in this case concerns the *scope* of said legislation in *derogation* of said ordinary immunity.

In support of its contention, appellee avers that the appealed decision deals with no question of constitutional immunity whatsoever and that no decision of any such question was, or is, necessary to a decision of this case.

As stated by the Court below at the beginning of its opinion: "The question is, What did Congress mean by the term 'real property' in the Act waiving immunity from taxation of certain property owned by government agencies?" And again, as stated by the same Court on p. 524 of the official report: "What did Congress intend by the term 'real property' in the statute which was designed to waive immunity in aid of the revenues of local communities in which industrial establishments were engaged in manufacturing defense material? Did it intend 'real property' to include the entire mill or manufactory (as provided by local law) or only the land and vacant buildings without the mechanical part of the plant?" That the court of first instance (the Court of Common Pleas of Beaver County, Pa.) likewise conceived the question is shown when it stated in its opinion (p. 133a): "The vital question in connection with the present case is what is intended by the Act of Congress by its reference to real property."

(5) By its assignment of error (3) and that part of assignment (2) which refers to the "laws" of the United States, appellant invokes jurisdiction here to obtain a review of the appealed decision as one holding the State law not to be repugnant to the aforesaid Act of Congress. Thus, appellant presents the question of the scope of the Congressional waiver. Appellee submits that this question is likewise frivolous rather than substantial as required by Rule 12, par. 1, of this Court.

As in sole support of its burden to demonstrate the substantial character of this question, appellant asserts that it "owns plant machinery and equipment which has been assessed for taxation under the Pennsylvania tax statute hereinbefore quoted in the aggregate sum of approximately $29,900,000" (p 11 of its "Statement as to Jurisdiction").

Appellee submits that said assertion of fact has no relevancy in law to a determination of substantiality in the Federal question here presented. Whether this question is "substantial" is determinable in law by the existence or non-existence of any judicial doubt regarding the intention of Congress in its enactment of the legislation involved—the intention to be determined by a consideration of the words used, the context, the purpose of the law, and the circumstances under which the words were employed: *Puerto Rico v. Shell Co.*, 302 U. S. 253, 258, and cases there cited. Appellant cites no decisions of any court whatsoever in conflict with the unanimous decisions of both courts below upon the point, and appellee avers that no such conflicting decision exists.

Appellee submits that the intention of Congress is entirely free from doubt, as the following brief argument will demonstrate:

(a) The evil to be remedied by the Act of Congress was the normal immunity of appellant's property from local taxation in the various states where it is located. The only possible cure for that evil is an application of the Act according to the laws of the several states, varied though they be. That such an application was what Congress intended is beyond peradventure of doubt.

(b) The statutory language itself proves the point. It ordains that "*any real property of the corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed*". The word "any" has a broadly inclusive significance that may not be overlooked. That it bears a relation to the word "other" which appears later in the clause is certain. The word "extent" means the space or degree to which a thing is stretched or extended and is synonymous with "compass": 35 C. J. S. 291, where it is shown that

the word has also been defined by the courts as "nature or character". When the use of these words "any", "same extent", and "other" is considered in the light of the plain purpose of the Act as one in waiver of the ordinary immunity from local taxation, it is manifest that Congress was permitting an *ad valorem* taxation of any real property of appellant corporation as any real property of like nature held by others than appellant is taxed locally. Hence, it is only *sensible* to conclude that Congress intended local law to determine what particular property falls within the locally taxable category of real property. Such an intention is the only *natural* one in the circumstances.

(c) Congress made no attempt to define the words "real property". There is no federal general common law (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78) and, hence, no federal common law definition of the words. But Congress knew that the several states had their own laws, both statutory and decisional, defining them for the purpose of local taxation. Clearly, therefore, it intended local definitions to apply.

(d) The assessment of such property, appeals therefrom, the levying of the tax, and the procedure for enforcing its collection, are all administered under local laws and cannot be otherwise administered. No necessity exists, as in federal revenue statutes and other nationally administered laws, for any uniform application thereof throughout the nation. Certainly, any attempt at uniform application would destroy the very purpose of the Act to permit *local taxation* of such property as other similar property is taxed.

(e) The legislative history of the Act confirms the point. By S. Rept. No. 292, of the 77th Congress, 1st Session, reporting on S. 1438 of that session (the amending bill involved), the "original policy of the

Congress" was "reaffirmed", that policy being, as there stated, one to provide "that real property of the corporation is to be subject to *nondiscriminatory* state and local taxes". Since a tax may discriminate *in favor of* as well as *against*, it is clear that Congress intended *neither* result to obtain and that appellant should gain no local tax preference over any other tax-paying owner of any similar "real property" located in any particular community. Accomplishment of such a result necessarily requires application of local law in defining the scope of the words "real property".

(f). Turning now to the language of the Act preserving the normal immunity of appellant's *personal property* from local taxation except as to its "buildings" located in states where "buildings" are subjected to personal property taxation, two things are clear: (a) that this portion of the Act deals with local *personal property tax laws* and *not* with real property tax laws; and (b) that Congress intended to subject appellant's "buildings" to the tax laws of the separate states according to the *operation and application* of those laws, whether they pertain either to personal property or to real property. Point (b) emphasizes the intention that local law should govern the application of the Act *in its entirety*. (And it is to be observed parenthetically that point (a) has a particular application to the case at bar wherein appellant's sole complaint is *not directed* at any taxation of its machinery as *personal* property under a state law taxing personal property, but *is directed* at the law of the state which makes its machinery an "integrated part" of appellant's *real* property, as stated by the court below (p. 522 of the officially reported decision).

(g). In conclusion, appellee reasserts its position that the intention of Congress to require application

of local law in any determination of the scope of the words "any real property" is clear and undebatable.

WHEREFORE, upon the ground that no substantial Federal question is presented by the record, appellee respectfully moves the Court to dismiss the appeal herein or to affirm the appealed judgment.

COUNTY OF BEAVER,
Appellee,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 40

RECONSTRUCTION FINANCE CORPORATION, SUCCESSOR TO DEFENSE PLANT CORPORATION, Appellant,

v.

COUNTY OF BEAVER, PENNSYLVANIA.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR COUNTY OF BEAVER, PENNSYLVANIA, APPELLEE.

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v.

COUNTY OF BEAVER, PENNSYLVANIA.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR COUNTY OF BEAVER, PENNSYLVANIA, APPELLEE.

JURISDICTION.

Appellant appears to misunderstand the basis of appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm. Appellee does *not* contend that Section 237(a) of the Judicial Code, as amended, is inapplicable to this appeal. It *does contend* that the appealed decision deals with no question pertaining to the ordinary immunity from local taxation enjoyed by appellant by implication from the Constitution of the United States, that no decision of any such question was or is necessary to a decision of this case, and that,

consequently, appellant's attempt to obtain a review of the appealed decision as one in favor of the validity of the State statute as concerns *any repugnancy to the Constitution* is *frivolous*. Appellee's point *in this respect* is that Congress legislated a *waiver* of the implied Constitutional immunity, and that the only question dealt with below, or necessary to be dealt with in decision of this case, concerns the *scope of the Congressional waiver*. The only Federal question involved, therefore, is whether the State statute, as construed and applied, is repugnant to the *Act of Congress defining the waiver*. Upon the ground that the intention of Congress is free from any reasonable judicial doubt as to the *scope of the waiver*, appellee contends that this Federal question is not of the *substantial* character required by Rule 12, par. 1, of this Court. In consequence of all of the foregoing, appellee's Motion to Dismiss or Affirm is based upon the ground that *no substantial Federal question* is presented by the record, and appellee presses for a favorable disposition of its motion.

COUNTER-STATEMENT OF THE CASE.

In 1942 Defense Plant Corporation was a Government-owned corporate agency or instrumentality of the United States, created or organized by the Reconstruction Finance Corporation under the authority of 15 U. S. C., §606b. By Joint Resolution of the Congress, approved June 30, 1945, and effective July 1, 1945, (Chapter 215, Public Law 109, 79th Congress), Defense Plant Corporation was dissolved and all of its functions, powers, duties, etc., were transferred to Reconstruction Finance Corporation with a direction that the latter

corporation "shall assume and be subject to all liabilities, whether arising out of contract or otherwise" of the dissolved corporation. Defense Plant Corporation was the original party appellant in this appeal. By appropriate motion granted by this Court pursuant to said Joint Resolution, Reconstruction Finance Corporation has been substituted as party appellant in succession to Defense Plant Corporation. For convenience, the word "appellant", as used hereinbefore and hereinafter, refers indiscriminately to either and both of said corporations.

The decision of the Court below is one in affirmance of an assessment of a mill or manufactory located in appellee County and owned by appellant. The assessment was made in 1942 by the proper authority under the provisions of a Pennsylvania statute (section 201 of the General County Assessment Law of May 22, 1933, P. L. 853, as amended; 72 Purdon's Pa. Stat. (5020-201) designating "mills and manufactories of all kinds" as *real estate* subject to taxation for local purposes and directing their assessment for application thereto of "the annual rate" of local tax levies.

Under the century old decisional law of Pennsylvania, a mill or manufactory is *an integral unit of real property* comprised of land, buildings, and all machinery upon the premises essential to its operation as a mill or manufactory. In its Statement as to jurisdiction, appellant states (p. 6) that it "has at no time sought to contest this construction by Pennsylvania courts of the Pennsylvania tax law". The fact is that the aforesaid settled decisional law of Pennsylvania not only applies to its tax law but also is a general rule of property law in Pennsylvania (R. 65-69). Pursuant to the

Pennsylvania statute and said decisional law, appellant's machinery upon the premises of its manufactory and essential to its existence and operation as such was included in the real estate assessment of its manufactory.

When the assessment of appellant's mill or manufactory was thus made, there was in force and effect the Act of Congress known as the Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 9, as well as the amendment of Section 10 thereof effected by Section 3 of the Act of June 10, 1941, 55 Stat. 248 (15 U. S. C. §610). The relevant language of said Act as so amended is as follows:

> "The [Reconstruction Finance] corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation * * * shall be construed to be applicable * * * with respect to the Defense Plant Corporation * * *. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by [the Defense Plant Corporation] * * *, but such exemptions shall not be construed to be applicable in any State to any buildings which

are considered by the laws of such State to be personal property for taxation purposes.".

The court of first instance (the Court of Common Pleas of Beaver County, Pa.) said in its opinion (R. 69): "The vital question in connection with the present case is what is intended by the Act of Congress by its reference to real property." At the beginning of its opinion, the Court below said (R. 83): "The question is, what did Congress mean by the term 'real property' in the Act waiving immunity from taxation of certain property owned by government agencies." And again, the Court below said (R. 85): "What did Congress intend by the term 'real property' in the statute which was designed to waive immunity in aid of the revenues of local communities in which industrial establishments were engaged in manufacturing defense material?"

Throughout this litigation, appellant has contended that the machinery upon the premises of its manufactory is immune from local taxation under the intendment of Congress in the enactment of the statute above quoted and should, therefore, not have been included in the assessment. Despite the finding of the court of first instance (finding No. 13, R. 55) that said machinery was necessary and essential to the existence and operation of its manufactory, and to which it has never taken exception, appellant continues so to contend in this appeal. The Court below held (R. 88) that the machinery was properly included in the assessment as required by Pennsylvania law, and as intended by the Act of Congress permitting *"local taxation"* of *"any real property"* of appellant *"to the same extent according to its value as other real property is taxed"*.

The foregoing simple Counter-Statement of the Case is deemed necessary and advisable in order to blow away the chaff in appellant's Statement and to bring into proper relief the only question believed by us to be involved in the merits of this appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

(1) Did Congress intend its permitted local taxation of "any real property" of Defense Plant Corporation to be governed by local law as to what constitutes such property for local tax purposes?

(2) Does the record in this appeal present a substantial Federal question?

SUMMARY OF ARGUMENT TO FOLLOW.

As to the merits. The decisive question is whether Congress intended its permitted local taxation of "any real property" owned by appellant to be governed by local law as to what constitutes such property for local tax purposes. We contend that it did so intend. The problem before Congress was a local one. The evil to be remedied was the normal immunity of such property from local taxation. The plain legislative purpose was to cure that evil. Due to the variety in state law definitions, the evil was not curable by any legislative definition for uniform application throughout the nation. The failure of Congress to define the term is significant *per se* of its realization of that fact. Had it intended a nation-

wide uniform application, Congress would and should have defined the term. The very language employed is determinative of the question. No decision upon prior Federal statutes employing the term "real property" casts any doubt upon the question. The legislative circumstances demonstrate an intention to subject appellant's real property to nondiscriminatory local taxation. Application of local law is necessary to prevent discrimination in favor of appellant. The preservation of immunity of personal property relates to personal property tax laws only. The portion of the Act dealing therewith emphasizes the legislative intent for state law application of the waiver as to real property taxation contained earlier in the same Act. This waiver of immunity is entitled to a liberal construction. Congress meant the full consequences of what it said. Decisions involving application of Federal revenue laws and other statutes solving national problems on a national scale prove, rather than disprove, the intention that local law is to govern the application of this Act. The inherent power of this Court to correct an inept characterization by a state court of the subject matter of a tax has no application to a determination of the question here. Congress created no Federal right in appellant to require this Act to be applied uniformly and without regard to State laws. Appellant itself concedes the decisive character of the question of intent for application of local law. The issue here pertains not to the prohibition against taxation of personal property but to the permission for taxation of real property. Taxation of appellant's plants as units of locally taxable real property imposes no unfair burden on the nation. By this Act, Congress has resolved whatever conflicts previously existed between appellant Governmental-instrumentality and the local industrial com-

munities in which its plants are located. Had the United States owned the entire plant involved in *U. S. v. County of Allegheny*, 322 U. S. 174, and had an Act similar to this Act been present in that case, the decision there would have been against the United States. Congress intended appellant's real property to be subjected to local taxation *exactly* as any other real property is taxed in the several States. And, as a *necessary corrolary* to that intention, Congress intended the words "any real property" to comprehend whatever is real property for local taxation purposes in the particular State where it is located. Appellant's plant was so taxed, and its appeal here is without merit.

As to the jurisdiction. The Federal question presented by the record is not a substantial one. There is complete unanimity of opinion upon it by both of the courts below. Appellant cites no case from any jurisdiction expressing any judicial doubt as to the legislative intent that local law is to govern the application of the Act of Congress here involved. That intention is crystal clear. Hence, the question is so free from judicial doubt as to deprive it of reviewability under Rule 12, par. 1, of this Court.

Conclusion. This appeal should be dismissed for want of substantiality in the Federal question presented. If not so dismissed, the appeal is without merit and the judgment below should be affirmed.

ARGUMENT.

I.

Congress intended its permitted local taxation of "any real property" of Defense Plant Corporation to be governed by local law as to what constitutes such property for local tax purposes.

(1) Appellant's argument is so formulated in context as to subordinate this question. However, in introducing its argument, appellant makes a vital concession concerning the question. In that introduction (see p. 17 of its Brief), appellant refers to "the question as to whether Congress intended state law to govern, and if not, what 'real property' was intended to mean", etc. By this *"if not"* clause, appellant obviously concedes the primary character of the question. But, disregarding its basic importance, appellant proceeds to indulge at great length in an argument dealing with the other question posed,—an argument which, of course, is a waste of effort if Congress intended state law to govern. Our argument on the merits of this appeal will deal solely with *this* question as the *decisive* one in the case.

(2) In *Jerome v. United States*, 318 U. S. 101, 104, this Court said:

> "At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. * * * But we must generally assume, in the absence of a plain indication

> to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 503."

It is our contention that the case at bar presents a clear instance of a "time" when it is to be "inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law". The Act here is not the type of act (*a Federal revenue law*) construed in *United States v. Pelzer*, in which, upon examination of the Senate and House committee reports, the Court found a general definition of the phrase there involved and came to the conclusion that the act there "plainly is not concerned with the varying local definitions of property interests". Nor is it the type of act construed in *Seaboard Air Line Ry. v. Horton*, in which the act (the Federal Employees' Liability Act) was "a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce", *a plain Federal field*. Nor is it the type of act involved in the *Jerome* case itself, as will be hereinafter fully demonstrated.

Upon thoughtful consideration, the conclusion is inescapable that any such "assumption" as is spoken of in the *Jerome* case can be derived only from the special *nature of the problem* with which Congress was dealing in the *particular legislation involved* and in which such

an "assumption" is logical in the circumstances. *All* federal legislation is for nation-wide application and, in a sense, establishes a nation-wide program. *But a nation-wide program does not necessarily contemplate a uniform application having no regard for state laws.* Whether it does so or not depends upon the nature of the particular problem which the program is designed to solve. The relevant inquiry goes primarily to the purpose of the curative program and the evil to be remedied by it. If the inquiry develops a logical basis for such an "assumption", it will of course arise. But not otherwise. We shall proceed with the necessary inquiry in demonstration of the lack of any basis for any such "assumption" as concerns the Act here involved.

(3) All property of a Government-owned corporation is wholly immune from local taxation by implication from the Constitution (*Clallam County v. United States*, 263 U. S. 341), unless such taxation is permitted by Congress under the powers delegated to it by Art. IV, Sec. 3, cl. 2, and Art. I, Sec. 8, cl. 18, of the Constitution. Thus, the *evil to be remedied* by the Act here involved was the normal immunity of appellant's property from local taxation. That was the *problem* before the Congress. It was engaged in a curative program to permit *local taxation* of "any real property" owned by appellant wheresoever it might be *located*. Such is the unquestionable *purpose* of the Act.

(4) The absence of any definition of what Congress intended *"any real property"* to mean is significant *per se*. Had it intended a definition for *uniform* application having no regard for state laws, Congress *could* and *would* have formulated such a definition.

Congress *knew* that there is no *federal general common law* (*Erie R. Co. v. Tompkins*, 304 U. S. 64, 68), and, hence, *no federal common law* definition of the words "real property" for *any* purpose, much less for a *tax* purpose. It *knew* that the laws of the 48 several states were historically rooted in different ideologies,—some in the common law of England, some in the canon law, some in the Napoleonic Code, some in the civil law, and some in curious combinations partly of one and partly of another of these various systems of law. It *knew*, therefore, that each of the several states had *its own laws*, statutory and decisional, defining "real property" for the purpose of the *"local taxation"* that Congress was engaged in permitting. It *knew* that there exists *the law of the conflict of laws*. It *knew* that, under *that law*, "Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the State where the thing is": *Restatement, Conflict of Laws*, §208. It *knew* that "the question whether a thing is movable or immovable, or more properly, whether it is to be *treated* as if it were movable or immovable, is governed by the law of the situs": Professor Beale's *Treatise on the Conflict of Laws* (1935 Edition), Vol. 2, p. 934. It *knew* that, as a generally accepted rule, the federal courts (including *this court*) adopt the state law's determination as to what constitutes real property: *Clark v. Clark*, 178 U. S. 186; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458; *W. T. Waggoner Estate v. Wichita County*, 273 U. S. 113; and see *in particular* the cases cited by the Court below (R. 86): *viz.*, *U. S. ex rel T. V. A. v. Powelson*, 319 U. S. 266, 279; *U. S. v. Bechtold Co.*, 129 F. 2d 473 (C. C. A., 8th, 1942); *U. S. v. 19.86 Acres of Land*, 141 F. 2d 344 (C. C. A., 7th, 1944).

Furthermore, Congress *knew* the canons of statutory construction as laid down in this Court's decisions. It *knew*, for example, that when a statutory provision admits of more than one construction, that one will be adopted which best serves *to carry out the purposes* of the act: *Bernier v. Bernier*, 147 U. S. 242, 246; that a statute should be construed to *effectuate its evident purpose*: *Royal Indemnity Co. v. American Bond & Mtge. Co.*, 289 U. S. 165, 169; that all statutes must be construed *in the light of their purpose*: *Haggar Co. v. Helvering*, 308 U. S. 389, 394; and that the meaning of the words used in a statute is to be arrived at by a consideration not only of the *words themselves*, but by considering, as well, the *context, the purposes of the law*, and the *circumstances under which the words were employed*: *Puerto Rico v. Shell Co.*, 302 U. S. 253, 258, and cases there cited.

Congress *knew* that by the famous *Tompkins* case, *supra*, this Court had restored to its full intended effect the mandate of Section 34 of the Federal Judiciary Act (28 U. S. C. §275), which reads as follows (emphasis supplied):

> "The laws of the several states, *except where* the constitution, treaties, or *statutes* of the United States *otherwise require or provide*, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

Congress *knew* that it would be the *State courts* that would be called upon to apply the Act here involved and that no State court would presume to devise a definition of "real property" as a term of *federal* nomen-

clature. It *knew* that the assessment of "real property", appeals therefrom, the levying of the tax, and the procedure for enforcing its collection, are all administered under local laws and cannot be otherwise administered. It *knew* that no necessity exists, as in federal revenue statutes and other nationally administered laws, for any uniform application of *this* Act throughout the nation. It *knew* that any attempt at uniform application would destroy the very purpose of the Act to permit *local taxation* of such property as other similar property is taxed.

Presumed and bound by law to have known *all of the foregoing,* Congress *failed* to legislate into this Act a definition of the term "real property" used in the Act. We repeat that its failure so to do is affirmatively significant *per se* of its intention. To intend that the various laws of the several states were *not* to govern the application of the Act, it would have been *necessary* for Congress to have defined the term. In no other way could Congress have made certain that when this Court had this statute before it for construction, as it now has, the Court would find in it the *sine qua non* for a departure from "the laws of the several states" as "rules of decisions" in Federal Courts. In short, to paraphrase but not to disturb the sense of the proverb, this is a case where Congressional *inaction* "speaks louder than words"! Fraught with meaning, its "silence is golden"!

(5) Congress was not dealing with an evil curable by an application of some uniform definition of "real property". The *real cure* for the evil being dealt with is peculiarly an application dependent upon the laws of the several states, varied though they be. The statutory

language itself is indicative that such a cure was what Congress intended. It ordained that *"any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed"*. The word *"any"* has a broadly inclusive significance that may not be overlooked. That it bears a relation to the word *"other"* that appears later in the clause is not to be doubted. The word *"same"* means: "not differing in kind; like in quality or qualities; indistinguishably alike": *Webster's New International Dictionary*. The word *"extent"* means: "space or amount to which a thing is extended; compass; [also, and much to the point here], the assessed value, *or the record made of the assessment*": *idem*. When the primary purpose of the entire clause as one in waiver of the ordinary immunity from *local* taxation is considered along with the use of the words "any", "same extent", and "other", it is manifest that Congress was permitting the taxation of any real property of appellant precisely as any real property of like nature held locally by others is taxed *locally*. Hence, it is only sensible to conclude that Congress intended *local law* to determine what particular property falls within the locally taxable category of real property. Such an intention is the only *natural* one in the circumstances.

(6) In an attempt to ascertain the intention of Congress as regards the use of the term "any real property" in the Act now before the Court, appellant refers to the language of prior statutes, such as the Act of June 3, 1864, 13 Stat. 111 (R. S. 5219; 12 U. S. C. §548, (3)) and the Federal Reserve Act of 1913 (38 Stat. 258; 12 U. S. C. §531) and some twelve other laws cited in

note 7 on p. 20 of its Brief. But appellant readily concedes that it has found no decisions in application of any of these prior statutes that throw any light on the intended meaning of "real property" or "real estate", as used in these laws, other than the few cases referred to on p. 19 of its Brief. Certainly, nothing in those cited cases has any bearing on the basic question involved here and now under argument, *i. e.*, the question as to whether Congress intended *local law* to govern in the application of this Act.

(7) This Act originated as H. R. 7360 of the 72nd Congress, 1st Session. The Committee report (H. Rept. No. 36 of the session) contains no comment whatsoever upon Section 10, the section of the Act here involved. The amending Act of 1941 originated as S. 1438 of the 77th Congress, 1st Session. It made no change in the language of the original Act pertaining to local taxation of real property. The Committee report (S. Rept. No. 292 of that session) commented on the existing law, *i. e.*, on the provisions of Section 10 of the original Act. The report contains the following relevant sentence:

> "The only qualification of these exemptions provides that real property of the Corporation is to be subject to nondiscriminatory State and local taxes".

After S. 1438 reached the House, its Committee reports (H. Rept. No. 616 and No. 616, Part 2) made substantially the same comment above quoted from the report of the Senate Committee. Neither the subsequent proceedings in both House and Senate relating to the "buildings" clause nor the conference report (all of which are recited in appellant's Brief at p. 23) dealt in

any way with the "real property" portion of the Act. The above quoted comment, therefore, discloses the intention of the Congress as to the point we are about to make.

Since a tax may discriminate either *against* or *in favor of*, it seems perfectly clear that the intention of Congress was to permit such local taxation of "any real property" of appellant corporation as is "nondiscriminatory" *in both of these senses.* That is to say, Congress intended that appellant's "real property" should be taxed without any discrimination either *against* or *in favor of* appellant. To relieve appellant from local taxation according to local law would be to discriminate *in its favor* and would not conform to the intention of Congress as thus stated in the reports of the Committees of both of its branches. It would obviously result in a local tax *preference* to appellant against all other local tax payers owning precisely similar "real property" and would thus *violate* the intention of Congress.

(8) We come now to the addition to Section 10 effected by the amending Act of 1941.

Notwithstanding its right and power to do so (*Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21), it was *wholly unnecessary* for Congress to enact any exemption of appellant's *personal* property from local taxation. It was *already* exempt therefrom by implication from the Constitution. Was Congress thus *unnecessarily* acting with a superabundance of caution? Or did Congress have some *other* objective in mind? We think it had a special objective and that the nature of that objective appears quite clearly in the language used.

Omitting all but the relevant words in that portion of the amendment that deals with the exemption of "personal property" and supplying those that must be supplied to arrive at the true sense thereof, we read the language as follows:

> "Such exemptions [as are specified in the opening sentence of this Section] shall also be construed to be applicable to the * * * personal property owned [by appellant], but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for [personal property] taxation purposes".

Thus, Congress was here dealing with a type of local taxation with which it had not previously dealt in the earlier portion of the Act by which it waived the normal immunity of appellant's *"real property"* from local taxation. It was here dealing with local *personal property* taxation. And what it was doing was *waiving* the normal *immunity* of appellant's "buildings" from local *personal property* taxation. It was thus accomplishing a *necessary* objective that it had in mind. But, it *was not* declaring "buildings" to be *personal* property in states where they are *real* property. Nor was it indicating that either *they* or *any other objects* that are part of *real* property for local real property taxation purposes are to be exempt from local taxation. And by the solicitous regard it demonstrated for *state laws* in its formulation of this amendment, Congress certainly *emphasized* its intention that *they, state laws*, are to govern the scope of the waiver of immunity of appellant's "real property" enacted earlier in the *very same Act*.

(9) Appellant quotes from *Austin v. The Aldermen*, 7 Wall. 694, 699, to the effect that a waiver of tax immunity of the United States "must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption" (p. 53 of appellant's Brief). But a mere glance at the cited case shows the quoted language to be mere *obiter dicta* of the opinion writer not necessary to the decision, because the facts of the case were concededly within the precise language of the Act of Congress there involved. On the other hand, when obliged by the facts before it to rule upon the point as a matter of law necessary to a decision of the case, this Court held in *Federal Housing Administration v. Burr*, 309 U. S. 242 (1940) that a waiver by Congress of a governmental immunity *in the case of corporations created as federal instrumentalities* should be *liberally* construed. And while the particular immunity *there* involved was the immunity from suit, the reasoning of the Court is equally applicable *here*. Said the Court (p. 249):

> "In our view, however, the bridge was crossed when Congress abrogated the immunity by this 'sue and be sued' clause. And no such grave interference with the federal function has been shown to lead us to imply that Congress did not intend the full consequence of what it said".

Here, the waiver is as to "any real property * * * to the same extent * * * as other real property is taxed". *Such words speak for themselves. Here*, likewise, the bridge has been crossed, and, no grave interference with the federal function having been shown, Congress must have intended "the full consequence of what it said".

(10) Appellant relies heavily upon the "assumption" spoken of in the *Jerome* case, *supra*, and quoted hereinbefore at p. 9. But, illogically enough, appellant utterly disregards the only true basis upon which any such "assumption" must rest, as pointed out above in our discussion of it. The cases cited by appellant on p. 51 of its Brief prove *our point*. They lend no support whatsoever to appellant's attempt to apply any such "assumption" to the Act here involved. *Lyeth v. Hoey, U. S. v. Pelzer, Morgan v. Commissioner*, and *Commissioner v. Tower* are all cases involving *federal revenue acts* "to be construed in the light of their general purpose to establish a nation-wide scheme of [federal] taxation uniform in application": *U. S. v. Pelzer*, 312 U. S. 399, 402-3. *National Labor Relations Board v. Hearst Publications* deals with the Wagner Act, in which Congress was engaged in solving a *"national* problem on a *national* scale" and not at all with such a *local problem* as it was engaged in solving by the Act *here*. In the Wagner Act, Congress created a *"national agency"* for administration of the Act *there*, a thing that it certainly did *not* do in the Act *here*.

The *Jerome* case involved an Act of Congress which provides punishment for one who enters a bank with intent to commit "any felony or larceny". The question *there* was whether the Act was broad enough to include a bank entry with an intent to commit what was a "felony" under State law but was not a "felony" under any federal statute. The conclusion reached was that the Act before the Court "is not deprived of vitality if it is interpreted to exclude state felonies and to include only those federal felonies which affect the banks protected by the Act". Such a conclusion was perfectly

logical in the circumstances. But it lends no support to any "assumption" that, in enacting the Act involved *in this appeal*, Congress was *not* making its application dependent on state law. Indeed, the very contrary is true as to *this Act*, for it *would be* deprived of vitality unless its application *is dependent* on state law.

(11) Apparently under the erroneous impression that we dispute the point, appellant argues that Federal courts have the power to construe Federal statutes in so far as the meaning of terms used in them are concerned. Of course, they have. And, of course, they have the power to disagree with any State court's interpretation of the meaning of a term used in a Federal statute. And, as exemplified in *Carpenter v. Shaw*, 280 U. S. 363 (cited by appellant), they have the power to correct a state court's characterization of an ineptly characterized tax whose real nature is to tax a subject matter that Congress has *forbidden* to be taxed. But, what has all this to do with ascertaining the intention of Congress as regards the application of the Act involved in *the case at bar*? And, in particular, what has it to do with the question as to whether Congress intended the application of *this Act* to depend upon local law as concerns the scope of the waiver of immunity here involved?

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(12) Appellant entirely misunderstands our purpose in citing such cases as *Waggoner Estate v. Wichita County*, *supra*, *Edward Hines, etc. v. Martin*, *supra*, and *Erie R. Co. v. Tompkins*, *supra*. They *are not* relied upon as authorities for any such proposition as an absurd contention that state property law is controlling regard-

less of its infringement upon a Federal right. But they *are relied* upon, as our argument above shows, to prove that, when Congress enacted the Act here involved, Congress *knew* the general rule that state property law governs in Federal courts, and that Congress *did nothing* in framing this Act to create a Federal right in appellant *requiring or providing otherwise,* which Congress could easily have done by defining the term "real property" had it intended that term to be given a uniform application throughout the nation.

(13) An argument that attempts to hide the *decisive question* in a case under a mass of chaff, albeit scholarly threshed chaff, cannot succeed. Appellant wastes laborious effort to prove error in the conclusion of the Court below that the prevailing view among the states does not support appellant's contention as to "a universally accepted meaning of 'real property' ". Likewise wasted is appellant's criticism of Pennsylvania law. It is also futile for appellant to argue *in this Court* such irrelevancies, under settled Pennsylvania law, as any inter-party contractual characterization of the nature of particular property and any contractually permissive removability of such property. We resist the temptation to argue in support of the conclusion of the Court below above mentioned. We content ourselves with an assertion that examination of the cases cited by that Court assuredly proves the rectitude of its conclusion. By its *"if not"* clause on p. 17 of its Brief, as particularly pointed out in Subsection (1) above, appellant concedes that the question of *first* importance is whether Congress intended state law to govern. We return now to that question as the *decisive* one in this case.

(14) Appellant leans upon a weak reed when it depends so heavily upon the express prohibition against the taxation of personal property added to the original Act by the amendment thereto. As we have hereinbefore pointed out, such an express prohibition was entirely *unnecessary*. The long settled immunity by implication from the Constitution itself took care of that. But, appellant feels that it must have *something* to support its position in the case. So it reaches out for a straw and contends for an immunity of "machinery" as personal property within this express prohibition of the amendment. If this case involved a Pennsylvania statute imposing a personal property tax on machinery, appellant would have some basis for its contention. But the Pennsylvania statute here involved, as quoted by appellant itself on p. 5 of its Brief, is a *real estate* tax statute, and the issue in this case is whether *that statute*, as construed and applied in Pennsylvania, is repugnant *not* to the Congressional prohibition against taxation of personal property *but* to the Congressional permission for taxation of "any real property".

(15) We are bound to take particular exception to appellant's preposterous suggestion (see p. 26 of its Brief) that to construe this Act of Congress so as to permit local taxation of appellant's manufacturing plants as all other local manufacturing plants are taxed would be to allow local industrial communities to profit at the expense of the nation. Who should know better than appellant the tremendous increase in necessary municipal expense required to protect and serve its plants and the influx of industrial workers and their families consequent upon the establishment and operation of its plants? What matters it that four-sevenths

of the money spent by Defense Plant Corporation was invested in machinery? Mere land with a building upon it does not constitute a manufacturing plant. It requires the machinery to make it such. It is the installation of the machinery and the operation of the resultant *plant* that causes the real increase in the required municipal servicing of the plant and its workers. Where are appellant's figures to prove profit to any local industrial community by the inclusion, in an assessment, of the machinery essential to the establishment and operation of a Defense Plant Corporation's plant located therein? Are not the people of such communities part of the people of the nation itself? And do not such people bear their share of the national expense,—including whatever taxes are imposed upon appellant throughout the nation? How, then, does the concept of a manufacturing plant as a single entity composed of land, building, and machinery essential to its operation enable either the local community where it is located or the people who inhabit the community to "take advantage" of a national emergency?

(16) Appellant concedes (p. 16 of its Brief) that *United States v. County of Allegheny*, 322 U. S. 174, "did not present the issue now before the Court". We take occasion, however, to quote an excerpt from the majority opinion *there* that is of *vital* importance *here*. At p. 190, the Court said:

> "The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity, and

what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and burdens is for other departments, and studies to that end have been undertaken. We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in petition to the Federal Congress, which also is their Congress."

The relevancy of that language to this case is clear. *Here* we have the *response* of Congress to just such a petition by "the localities". *Here*, Congress itself resolved the conflict between the interests of Defense Plant Corporation (whose very name signifies its own industrial character) and those of local "industrial communities". Viewed in the light of the language of this Court, the *real* question *here* becomes *this*:

> Did Congress intend this plant of appellant to be taxed in the same manner as all other plants in the same industrial community are taxed?

We submit that this question must be answered in the affirmative. Had the United States been the owner of the entire manufactory involved in *United States v. County of Allegheny* and had such a statute been present in *that* case as is present in *this* case, who can doubt how this Court would have decided that case?

(17) In the opinion of the Court below (R. 86), reference is made to certain language of this Court germane to the question now under argument and which

will bear repetition. In *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S., 266, 279, this Court said:

> "Though the meaning of 'property' as used in Section 25 of the Act [involved in that case] and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to the local law."

The Act involved in that case was the "Tennessee Valley Authority Act of 1933", 48 Stat. 58. Section 25 of the Act is set forth in 16 U. S. C. §831x. If the content of the word "property", as *there* used, is normally to be obtained by reference to the local law, how much *more so* is the term "real property", as used in the Act *here* involved, when a comparison of the contexts and the purposes of the two Acts is made! This Court attributed no legislative intention for *uniformity* in definition to the general word "property" in the Act *there* before it. In deciding the case, it left the application of the Act to the law of the State where the property was located. Can the Court do otherwise in the legislative circumstances *here*?

Another case cited by the Court below (R. 80) is especially pertinent, — *U. S. v. Bechtold Company*, 129 F. 2d, 473 (C. C. A. 8, 1942). It well deserves the attention of this Court in its consideration of this appeal. The issue and its decision were as follows. The Historic Sites Act of August 21, 1935, 49 Stat. 666 (16 U. S. C. §§461-467), gave the Secretary of the Interior the power to "acquire in the name of the United States by gift, purchase, or otherwise, any property, personal or real". Acting under this Act, the United States proceeded to condemn certain property described in the petition as "*real estate*" located in St. Louis, Missouri. The Govern-

ment contended that it was liable to compensate the owner only for the land and the building thereon erected. The owner contended that the "real estate" being condemned was "a completely integrated plant, including land, building, equipment and machinery", and that, accordingly, the Government was liable under the Act for the value of the entire plant. The Court held in favor of the owner. It said (p. 477):

> "Whether or not these fixtures and machinery under the facts disclosed constituted a part of the realty was dependent upon the law of the State of Missouri, the *lex loci rei sitae*. This was a question of real estate which must always be determined by the law of the state in which the realty is located. Clark v. Clark, 178 U. S. 186; Restatement, Conflict of Laws, Sec. 208. This is true regardless of how the court may have acquired jursidiction or where the court may be located. The same principle is applicable in the determination of the question as to what law governs in the ascertainment of whether certain articles are or are not fixtures. The law of the state where the property is situate also controls in deciding whether annexation of a chattel to a freehold makes it a part of the realty. Triumph Electric Co. v. Patterson, 8 Cir., 211 F. 244; Manufacturers Bank & Trust Co. v. Lauchli, 8 Cir. 118 F. 2d 607; Bergh v. Safe Co., 2 Cir., 136 F. 368.
>
> We therefore look to the law of Missouri. It is well established by controlling decisions of Missouri that where machinery is placed in a building and the land, building and machinery are used together as a factory or plant, the machinery is a part of the realty."

Appellant attempts to treat these cases lightly by referring to them as "condemnation cases" (pp. 53-54 of its Brief). But a *ruling principle of law* loses none of its force by its application to a particular type of case. The fact that local law governs the application of federal condemnation acts is strong evidence that it governs the application of the Act in the case at bar, whose plain purpose is to permit *"local taxation"* of *"any real property"* of this appellant corporation.

(18) We conclude this argument on the merits of the *decisive question* in this case, therefore, by submitting that Congress intended appellant's real property to be subjected to local taxation *exactly* as other real property is taxed in the several States, and, *as a necessary corollary to that intention,* that Congress intended the words "any real property" to include and comprehend *whatever is real property for taxation* purposes in the particular State where it is located.

II.

This appeal fails to present a substantial Federal question.

(1) As we view this appeal, it presents but one Federal question, *i.e.,* whether Congress intended the application of the Act here involved to depend upon local law. There is complete unanimity of opinion upon the question by both of the courts below, and we contend it to be so entirely free from reasonable judicial doubt as to deprive it of reviewability under Rule 12, par. 1, of this Court. It is not a *substantial* question.

(2) The Act of Congress here involved has been the law since 1932, and the amendment bringing Defense Plant Corporation's real property within it has been in force since 1941. But the exhaustive Brief for appellant, which has apparently been in preparation since this Court noted probable jurisdiction on March 26, 1945, (R. 100), fails to cite a single case wherein any judicial doubt has ever been expressed as to the legislative intent that local law should govern. If any such case exists, appellant's extraordinarily extensive research surely would have uncovered it. We know of none.

(3) As to the clarity of the intention of Congress, we rely on the argument hereinbefore made upon the question. Resting upon that argument, we respectfully submit that this Court itself will find the question to be free from any doubt. If so, appellee's motion for dismissal, not yet adjudicated, will receive an appropriate disposition.

III.

Conclusion: This appeal should be dismissed or the appealed judgment should be affirmed.

(1) As shown by Paragraph Twenty of the agreement of lease from appellant to Curtiss-Wright Corporation (R. 19), the economic burden of the tax is imposed on the lessee. Thus, the situation *here* in that respect is just the reverse of that in *U. S. v. County of*

Allegheny, supra, where its ultimate burden was upon the Government.

(2) Said paragraph of the lease specifically covers all taxes "with respect to or upon the site, the buildings, or the machinery or any part thereof". The lease is dated March 5, 1941 (R. 11). The amendment to the Act of Congress granting permission for local taxation of appellant's "real property" was enacted on June 10, 1941. (R. 9). Thus, while the amendment was pending and undoubtedly in anticipation of its enactment, appellant evidenced its expectation that its "real property" would be made subject to local taxation and that such taxation would include its machinery as part of its plant, pursuant to Pennsylvania law. Now, when its plant is so assessed, appellant inconsistently objects, even though it does not have to pay the resultant tax.

(3) The act of the assessor in fixing the value of the machinery is not to be construed as constituting a separate assessment of it. Under settled Pennsylvania law, this is mere clerical procedure for the information of the land owner. "While the property might have been valued in one item, the integrity of the assessment was not affected by the fact that the assessor enumerated the elements entering into the aggregate of the valuation on each": *Guthrie v. Pittsburgh Dry Goods Co.,* 47 Pa. Superior Court 384, 400. Thus, the form of the assessment of appellant's plant here involved (R. 83, note 1) has no material significance.

(4) In conclusion, appellee respectfully submits that, if this appeal is not dismissed for want of sub-

stantiality in the Federal question it presents, the appeal is without merit and the judgment below should be affirmed.

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County Solicitor

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Attorneys for Beaver County, Pa.,
Appellee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 40

RECONSTRUCTION FINANCE CORPORATION, SUCCESSOR TO DEFENSE PLANT CORPORATION, Appellant,

v.

COUNTY OF BEAVER, PENNSYLVANIA.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR COUNTY OF ALLEGHENY, PENNSYLVANIA, AMICUS CURIAE.

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The County of Allegheny, Pennsylvania, is interested in the question involved in this appeal by reason of the present pendency of a number of appeals from assessments of Defense Plant Corporation plants located within it, and whose decision will be governed by the result of this appeal. Accordingly, it files this brief as *amicus curiae* under the permission of Rule 27, par. 9, of this Court.

The Brief for County of Beaver, appellee in this case, presents a comprehensive treatment of the issue involved. As *amicus curiae*, Allegheny County endorses

the entire argument therein contained. It would seem to prove conclusively that unless Congress intended local law to govern the meaning and scope of the term "any real property" the plain purpose of the Act involved is defeated. It was waiving the normal immunity from local taxation of such property. How could its objective be accomplished otherwise than by application of local law in determination of the meaning of that term?

Respectfully submitted,

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First Assistant County Solicitor,
Attorney for County of Allegheny,
Pa., *Amicus Curiae.*

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In the Supreme Court

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Appellant,

vs.

COUNTY OF BEAVER, PENNSYLVANIA,
Appellee.

STATEMENT OF THE CASE

A. Appellant's Properties in California

The value of Appellant's properties in California exceeds $100,000,000. The taxes levied by local California taxing agencies on these properties exceeded $2,000,000 in 1944, and were of a like amount in 1945.

Thus far Appellant has conceded that taxes were properly levied against its land and buildings (including the floors, walls, roofs, heating systems, and plumbing systems), but has contended that its manufacturing equipment is personal property and is therefore exempt. It therefore contends that from

two-thirds to three-fourths of the taxes have been illegally assessed, for in most instances the assessed value of the machinery and equipment is several times the value of the land and buildings.

Some of the machinery which Appellant owns in California is similar to that installed in the Beaver County plant of the Curtis-Wright Corporation. But Appellant also owns oil refineries and synthetic rubber plants where the equipment consists principally of pumps, tanks, boilers, blower units, compressors, and heat exchangers, only a small portion of which are located within the walls of buildings. In these plants fluids and gases move continuously through the equipment, pipes, tubes, and tanks, the bulk of the equipment being joined together to form a homogeneous unit for production. Some idea of the character of the equipment in these plants may be gleaned from two photographs of Appellant's Richmond, California, gasoline refinery (Op. p. 23.)

Somewhat similar are the plants in which aluminum is refined. The equipment is specially designed and centers around the reduction pots in which aluminum oxide is reduced to metallic aluminum. Each of these plants includes a large electric substation in which current is reduced from high to low voltage and converted from alternating to direct current, and equipment used for bringing the ore to the reduction pots and for hauling the metal away. Photographs of a reduction pot and the rectifiers installed at Appel-

lant's Riverbank (Stanislaus County) plant appear following p. 22.

In addition, there is a completely equipped extrusion foundry, a completely equipped plant for the manufacture of copper pipe and tubing, a magnesium plant and a steel plant, and many other installations. There are overhead cranes in most of the buildings and gantry cranes in open yards.

There are also the more conventional types of plants (like the Curtis-Wright plant) which are equipped principally with lathes, grinders, drills, presses, and other machine tools. In these plants airplanes, airplane parts, and marine engines were manufactured. The value of these machine tools is substantial although it represents but a small part of the machinery and equipment located in California which Defense Plant contends is exempt under Section 10 of the R. F. C. Act.

The machine tools are installed in many different ways although in most cases they are placed upon specially constructed concrete foundations and are held in place by bolts or screws.

B. Appellant's Contentions

While it is doubtful that the machinery in any of Appellant's California factories has been moved as much as the machinery in the Curtis-Wright plant, the argument advanced by Appellant would, if accepted by the Court, preclude the taxation of the bulk of the California machinery and equipment, for Appellant argues that land and buildings alone are taxable.

We take issue with Appellant's contention that Congress intended that a uniform interpretation of the words "real property" should be applied throughout the country, and we also believe that appellant has erred in stating the general law with respect to fixtures.

STATUTES INVOLVED

Section 10 of the Reconstruction Finance Corporation Act reads as follows:

> "Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or thereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except as provided in section 742a (a) of Title 31. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; *except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent, according to its value as other real property is taxed.* The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation

but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, (2) The RFC Mortgage Company, the Federal National Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, *but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes.*" (Italics added.)

It will be noted that the words "real property" are not defined in the statute. However, almost all of the 48 States do have a statutory definition of the term. The California definitions are printed in the appendix.

SUMMARY OF THE ARGUMENT

The question involved is one of statutory construction. Congress intended that the various local defini-

tions of "real property" should be applied in determining the taxability of property belonging to the corporation because it was concerned primarily with uniformity within States rather than uniformity throughout the country. The intent is apparent from the language of the statute itself, and is also to be inferred from the fact that the members of Congress were familiar with the fact that there were wide variations between the tax systems of the several States.

Even if it should be concluded that Congress intended the words "real property" to be interpreted uniformly throughout the country, Congress intended that machinery should be taxed as real property. The courts of most of the States have determined that machinery is real property, and there is no support for Appellant's theory that the land and buildings alone are taxable.

ARGUMENT

At the outset it may be observed that this brief is written upon the assumption that the Defense Plant Corporation is an instrumentality of the United States and upon the further assumption that the supremacy clause gives Congress the power to mark the limits within which the States may tax the corporation. (*Federal Land Bank* v. *Bismark Lumber Co.*, 314 U. S. 95.)

Congress has declared the corporation to be exempt from most taxes but it has specifically provided that its real property "shall be subject to * * * local

taxation to the same extent according to its value as other real property is taxed." California contends that by the use of this language Congress has authorized it to tax the machinery and equipment installed by Defense Plant Corporation in its California factories.

I. Congress Intended that Local Definitions Should Be Followed

A. LEGISLATIVE HISTORY

There is little in the legislative history which is of assistance. The R. F. C. Act was enacted in 1932. It was amended in 1941. There was little discussion of the real property problem in Congress on either occasion although in 1941 a proviso was added that "such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of each State to be personal property for taxation purposes."

Both sides claim to draw comfort from the enactment of this amendment. It seems to us, however, that the amendment was enacted because Congress believed that local definitions of real property were to be applied instead of a general definition and because it wished a general interpretation to be applied in that one particular instance. Under Michigan law buildings erected on leased land are treated as personal property for taxation purposes. It was because Congress thought that this definition would control that it added the amendment. The 1941 legislation indicates a belief on the part of Congress that

the property of appellant was to be taxed as other property was taxed in the several States. There is no indication that when Congress enacted this amendment it thought that appellant's properties were to be taxed the same throughout the country.

B. SECTION 5219 OF THE REVISED STATUTES AND SECTION 10 OF THE R. F. C. ACT SHOULD BE CONSIDERED TOGETHER

The language of the R. F. C. Act is taken almost word for word from Section 5219 of the Revised Statutes, enacted in 1878. That section provided that "* * * Nothing herein shall be construed to exempt the real property of (national banking) associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Section 5219 was enacted for the purpose of preventing discriminatory taxation against National banks and Section 10 of the R. F. C. Act was enacted for the same purpose. The fact that the States might indulge in discriminatory taxation against national banks had been demonstrated. (See *McCulloch v. Maryland*, 4 Wheat. 738; *Osborn v. Bank of the United States*, 9 Wheat. 738.

The reason for the denial of the privilege of taxing the personal property of National banks is not obscure. Banks invest their capital in personal property. Taxes on bonds, mortgages and cash would bear heavily on banks. A nondiscriminatory tax on cash would be discriminatory in effect if the banks had all the cash. But it was not contemplated that

the banks would invest in real estate. They were authorized to acquire their banking premises and to acquire real property upon the foreclosure of mortgages, but Congress did not wish the banks to hold real property as an investment. A nondiscriminatory tax on real property could not operate in a discriminatory manner and an exemption of real property would encourage the holding of real property by banks, something Congress did not want.

The same reasoning must have activated Congress in applying this exemption to the R. F. C. It was anticipated that it would acquire intangible property of considerable value and that it would acquire real property only when it was forced to foreclose mortgages. Ordinarily, a nondiscriminatory tax on real property would not interefere with the R. F. C. for Congress did not contemplate that the corporation would hold substantial amounts of real property.

When the acquisition and construction of industrial plants by Defense Plant Corporation and by Rubber Reserve Corporation was authorized no change was made in the wording of Section 10. The language of the statutes enacted to deal with banking corporations was left to apply to the new corporations. Congress must have been satisfied to permit their real property to be taxed as the real property of National banks had been taxed.

Since 1878 National banks located in Pennsylvania have, no doubt, foreclosed mortgages on factories located in that State and after foreclosure, have paid

taxes on the factories as a whole (land, buildings, and machinery). On the other hand National banks in Ohio have paid no taxes on machinery for that State treats machinery as personal property for purposes of taxation. It would have been idle to argue to the courts of Pennsylvania or Ohio that Congress intended that a uniform definition of real property should be applied in each of the States. Congress did not care whether National banks in Maine bore the same burden of taxes as National banks in California. (It gave the States a number of alternatives with respect to the taxation of bank shares). But Congress did consider it vital that a National bank in Maine should be treated no worse than a State bank in Maine. The legislation was aimed at discrimination within the States and its goal was uniformity within the States.

For example, California treats bank vault doors as real property and taxes both State and National banks thereon.[1] Ohio probably follows a contrary rule.[2] Local definitions are controlling. If Section 5219 required California to apply the Ohio rule then National banks in California would be given a preference over California State banks. This was not what Congress intended.

When Congress used the same language with respect to the exemption of the R. F. C. from taxation, it contemplated that the language would be interpreted

[1] *San Diego Trust & Savings Bank* v. *County of San Diego*, 16 Cal. 2d 142; ___ Pac. 2d ___; Cert. denied 312 U. S. 679; and see *Trabue Pittman Co.* v. *County of Los Angeles* ___ Adv. Cal. ___ (decided April 9, 1946).)

[2] (Compare *Zangerle* v. *Standard Oil Co.*, 144 Ohio St. 529, 60 N.E. 2d 52.)

in the same way. Some States specifically exempt manufacturing plants from taxation. If the R. F. C. foreclosed a mortgage on a factory in those States, it would pay no taxes. Other States specifically exempt machinery from taxation, and still others provide that machinery shall be classified as personal property for purposes of taxation. But in some States statutes provide that it shall be classified as real property for purposes of taxation, and in many more States the courts have reached the same result.

Congress subjected the property of the R. F. C. to any of the various systems of taxation which might be applicable to it. It was primarily concerned that the States should not discriminate against the corporation by taxing its intangible property. It did not contemplate that upon foreclosure of a mortgage on a factory by the R. F. C. it should be in any better position with respect to local property taxation than a National bank or a State bank.

In discussing R.S. 5219 the Government cites *People* v. *National Bank of P. O. Mills & Co.*, 123 Cal. 53; *First National Bank* v. *San Francisco*, 129 Cal. 96; and *San Francisco* v. *Crocker-Woolworth National Bank*, 92 Fed. 273. In each of these cases it was assumed that the bank fixtures were personal property and the Court merely held that R.S. 5219 precluded the taxation of personal property. In the latter California case of *San Diego Trust & Savings Bank* v. *County of San Diego*, 16 Cal. 2d 142; 105 Pac. 2d 94; 133 A. L. R. 416, the earlier cases were

distinguished on that ground and it was held that bank vault doors were improvements to land. One of the plaintiffs, a National bank, sought certiorari upon the ground that R.S. 5219 precluded taxation of the "fixtures." The writ was denied.[3] The California court has reaffirmed the rule in a decision not yet reported.[4]

C. THE LANGUAGE OF THE 1940 ACT IS OF NO SIGNIFICANCE

Emphasis is also placed upon the language of the 1940 act which authorized the organization of the Defense Plant Corporation. The statute (54 Stat. 573 (15 U.S.C. 606), authorized the corporation to do several things (1) to "purchase" land, plants, and equipment, supplies, and machinery, (2) to "lease" land or plant; (3) to "build" or "expand" plants and (4) to "produce" equipment, supplies, and machinery. When the statute was enacted there was an acute shortage of machine tools and the corporation was authorized to buy such tools or to produce new ones. It was also authorized to buy, lease, or expand existing plants. If the corporation bought or leased a "plant" it would acquire land, buildings, machinery, and equipment. An industrial plant is a working organism, not land and empty buildings to which machines are to be added. When machines are installed in a "plant" they become part of it and until the machines are installed the structure is not a

[3] (*United States National Bank of San Diego et al. v. County of San Diego*, 312 U. S. 679.)

[4] (*Trahue Pittman Co. v. County of Los Angeles*, ___ Adv. Cal. ___, decided April 9, 1946.)

"plant." It is nothing but an empty building. When the Government buys a plant, it buys the machinery in it as well as the buildings. When it condemns an industrial plant it pays for the machinery as well as the buildings for it must take the entire plant.[5]

Authority to construct an industrial plant would include the power to install the necessary machinery therein. The grant of the supplementary power to purchase machinery does not indicate that Congress so misconceived the state of affairs as to believe that production machinery does not become a part of an industrial plant.

D. THE CHANGES IN THE WORDING OF THE 1941 AMENDMENT

It is also urged that the elimination of the words "or structures" from the House amendment to the bill amending Section 10 of the R. F. C. Act is significant. Actually the amendment as a whole demonstrates a conviction upon the part of Congress that local definitions of real property were controlling. Congress believed that because under some circumstances the law of Michigan treated buildings as personalty for purposes of taxation, it could not tax buildings even though at common law buildings on leased land were usually regarded as real property. With the exception of this single amendment, Congress preferred that local definitions should control. It must have known that in some States machinery and equipment were treated as personal property for purposes of taxation. Yet it did nothing about either

[5] *United States* v. *Bechtold Co.*, 129 Fed. 2d 473.

situation. It preferred that as to these things local law should prevail. It neither declared that "structures" should be real property nor did it declare that they should be personal property. It provided no definition.

E. THE UNIVERSAL LEGAL DEFINITION OF REAL PROPERTY

Furthermore, Congress must have been familiar with the ordinary legal definition of the term "real property." At common law "real property" includes the land and things which are affixed to the land. Every State in the Union recognizes that improvements to land are real property and almost all apply the same tests in determining whether or not "fixtures" have become a part of the land. The three tests applied are the following:

1. Actual or constructive annexation of the article in question to the freehold.
2. Appropriation or adaptation to the use or purpose of that part of the freehold with which it is connected.
3. The intention of the party making the annexation to make the article a permanent affixation to the freehold.

The difficulty arises only in applying these tests. Varying results are obtained in many of the States, and it can not be said that the three tests are applied with any degree of uniformity. In *Thomson* v. *Callon*, 196 Wis. 581; 219 N. W. 439, 446, the Court said:

> "Questions of what fixtures pass as real estate arise principally in the following situations: (1) Between vendor and vendee; (2) mortgagor and

mortgagee; (3) landlord and tenant; (4) owner of life estate and remainderman; (5) seller under a conditional sales contract as against mortgagee and subsequent vendees and prior mortgagees; (6) with reference to taxation. Generally speaking, the rule is very liberal with respect to the rights or mortgagees and vendees. A much stricter rule is applied as against a landlord in a contest between landlord and tenant. It is probably that no branch of the law is in greater confusion than the law of fixtures. Confusion is due in some degree at least to a failure to classify the cases. There is a constant tendency to carry over decisions in one classification and to apply them to cases in other classifications, ignoring the difference in the legal relation of the parties."

In the light of the confusion of which the Court speaks it is doubtful that Congress intended that all questions as to the classification of property belonging to National banks and the R. F. C. should be settled for tax purposes by this Court. If Congress had intended that a uniform definition should be applied, it would have adopted such a definition. It would not have used words of such uncertain meaning without definition.

On the other hand, Congress knew that the States applied generally similar rules in reaching a conclusion as to what was an improvement to land and it is hardly conceivable that they thought that the word "improvement" and the word "building" were synonymous.

F. UNIFORMITY THROUGHOUT THE NATION WOULD BE IMPOSSIBLE TO ATTAIN

Congress subjected the corporation to local property taxes with all of their differences and expressly indicated a desire for uniformity within each of the States by declaring that the corporation's property should be taxed "as other real property [in that State] is taxed." It knew that no two States agreed precisely upon the law of fixtures and it intended only to limit the States to the taxation of land and improvements to land, leaving to each State the right to determine what was affixed to land. It is only in this way that uniformity within each State could be attained.

If Congress had believed that it was necessary that the property of the Defense Plant Corporation be taxed in the same way in each State, it would not have subjected the corporation to the varying tax systems of the several States. California, for example, levies no state-wide tax on property, but the cities and counties of the State are supported principally by taxes upon real and personal property. The California schools are supported partly by taxes on property and partly by State funds derived from other taxes. In some States the property tax is used for the support of the State Government as well as for the support of local government; in other States the schools are supported entirely by the property tax and in still other States they are supported entirely by other taxes. There are variations in tax rates, in

methods of assessment, and in exemptions granted to types of property and to persons.

If the Curtis-Wright Plant were located in another Pennsylvania County, it would probably bear a different burden of taxation for the tax rate would probably be different. If it were located in a different State, it would bear a still different burden. It is even conceivable that a State which exempts machinery from taxation might exact more taxes than those which were imposed by Beaver County on the plant, including the machinery. The rates in Pennsylvania may have been low and those in neighboring Ohio, high. Congress knew that uniformity in the taxation of real property belonging to the R. F. C. and its subsidiaries was impossible. The variations in the definition of the term "real property" are only one of many factors in the fluctuations in the burden of property tax.

If Congress had desired, it could have provided for a greater degree of nation-wide uniformity by providing for payments in lieu of taxes. The R. F. C. Act was amended to provide for the taxation of property belonging to the Defense Plant Corporation on June 10, 1941. Eighteen days later the Lanham Act (42 U.S.C. 1546) was amended. That act provides for the payment of sums in lieu of taxes to the local taxing districts in which Federal housing projects are located. Under that statute the Government could effect substantial uniformity in payments to local governments. Housing projects at least, are not sub-

ject to the varying methods of assessing property. In enacting the Lanham Act, Congress did have an eye toward uniformity; but it gave no thought to uniformity when it amended the R. F. C. Act.

The Congress necessarily knew that the tax laws of Massachusetts were different from those of California and that both of these were different from the law of Louisiana. The date of the tax lien, the assessing and equalizing officer or body, the method of determining the tax rate, the method of collecting the tax, the procedure for procuring a refund are all different and Congress knew it. In Pennsylvania, Appellant followed Pennsylvania procedure for contesting the legality of the taxes assessed against it by appealing to the Beaver County Court. In California it paid the taxes under protest and filed suits for refund in accordance with California procedure. In fact, Appellant accepts these State tax laws of Pennsylvania and California as controlling in every feature and aspect except in the definition of "real property."

Everything in the language of the statute and its history points to the conclusion that Congress was concerned primarily with uniformity within States. Section 10 of the R. F. C. Act, like Section 5219 of the Revised Statutes, was enacted to prevent discrimination within States not to require each State to treat the Federal corporations alike.

G. THE LANGUAGE OF SECTION 10 ITSELF SHOWS AN INTENT THAT LOCAL LAW SHOULD CONTROL

Congress declared that the property of the Defense Plant Corporation should be "subject to" the tax laws of the several States. It expressly subjected the corporation to 48 different laws. When it declared that the real property of this agency of the Government should be subject to the tax laws of the 48 States, it must necessarily have intended that it should be subject to the definitions contained in those tax laws. To be entirely subject to the laws of the 48 States, it is essential that the corporation be subject to the definitions contained in the law.

Further evidence is contained within the language of Section 10 which discloses the intent of Congress that the definition of the term "real property" should be controlled by State law. The expression "real property" is used twice in the statute. The statute provides that "the real property of the corporation" shall be subject to local taxation to the same extent as "other real property" is taxed. The "other real property" thus referred to is obviously all real property within each State owned by persons other than the R. F. C. and its subsidiaries. Congress did not intend to rewrite the tax laws of each of the States. When it referred to other real property, it meant real property as that term is defined by each of the 48 States.

The statement that the "power to tax involves the power to destroy" found its origin in a governmental immunity case. It was with this in mind that Congress provided that this agency of the Federal Gov-

ernment should be taxed on to the same extent and in the same manner as other taxpayers are taxed upon their real property. The object and purpose of the enactment was not to require that the property of the R. F. C. and its subsidiaries be taxed differently from the property of other persons in each State. Rather the statute was designed to prevent taxation discriminating against this agency. Uniformity within each State was the goal.

H. THE PURPOSE OF THE WAIVER

The Government urges that the purpose of the waiver of immunity was to prevent the diminution of the revenues of local taxing districts and that to permit the States to tax machinery and equipment permits them "to gain by the war necessities of the Nation."

If a city in which an industrial plant were located provided water or electric light and power to Appellant, Appellant would expect to pay for the services. It would hardly accuse that city of profiting by the "war necessities of the Nation" merely because it was paid for the services rendered by its utilities department.

Ordinarily the owner of an industrial plant pays part of the cost of providing police and fire protection for his plant and his workers. He also pays for providing sanitary facilities, recreation facilities, schools and hospitals. He usually pays for those services by paying property taxes and these taxes are

ordinarily measured by the value of his land, his buildings, and his machinery, appraised as a unit.

This is not the appropriate forum to argue the question of whether the United States should assume the same burdens as another owner of an industrial plant. It is appropriate, however, to point out that Congress concluded in this case that it was desirable for the Defense Plant Corporation to make a contribution to the cost of local government by the payment of taxes. This was a matter of policy which Congress decided.

When a building is constructed in a taxing district for use as a warehouse, it draws a few people into the community and perhaps leads to only an insignificant increase in the cost of government. But when machinery and equipment are installed in a building and it becomes an industrial plant instead of a warehouse, hundreds or sometimes thousands are attracted to the community and the cost of government increases rapidly.

Substantially every local community in which Federally-owned war projects were erected was immediately forced to expand its activities. The influx of war workers required additional fire, police, and health protection. It required expansion of school and hospital facilities and an increase in all other governmental functions. In some cases in which the Government itself owned shipyards and similar facilities which were entirely exempt from taxation it was necessary for the Government to finance the construc-

tion of sewers, the building of hospitals and schools, and even to contribute to the maintenance of the local police departments. (See *Fortune*, Feb. 1945, p. 262, Richmond Took a Beating.)

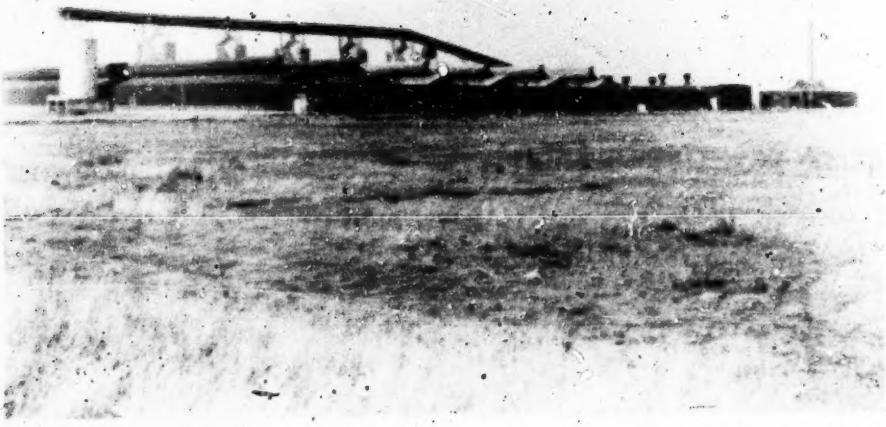
If a purpose may be assigned to the waiver of tax immunity it must be evident that the purpose was to require Appellant to assume its normal share of the burden of supporting local government. If Congress had debated the problem, we submit that it would have required Appellant to pay greater taxes on an industrial plant than it might pay on an empty building.

The Appellant also suggests that in the absence of a uniform tax day, machinery might be so moved about that it might be taxed in several jurisdictions. Appellant does not suggest that this has happened and indeed it would be surprising if that result did occur while Appellant retained the power to determine in which jurisdiction its property would remain. There would seem to be a greater prospect that Appellant would avoid taxes altogether on some of its property by reason of differences in the tax day.

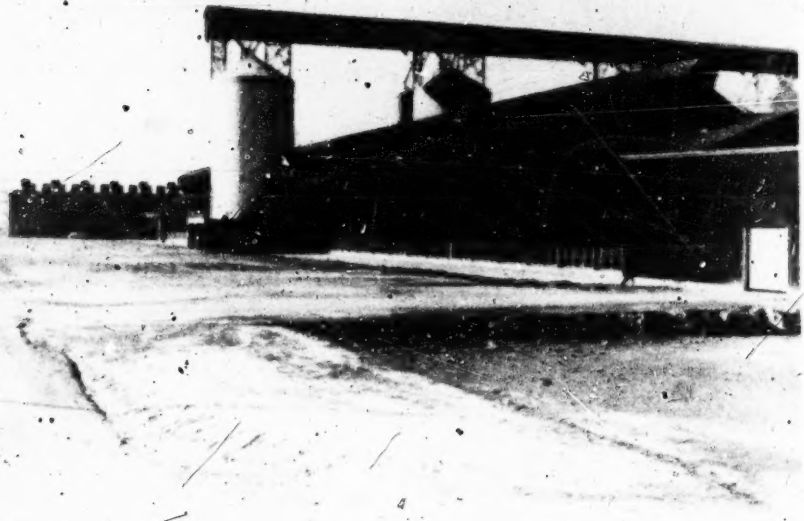
This problem would be present in the case of stocks of materials and supplies which were in fact moved about the country but Congress hardly anticipated that there would be a substantial movement of machinery which had been placed in use.

I. "REAL PROPERTY" INCLUDES ALL FIXTURES

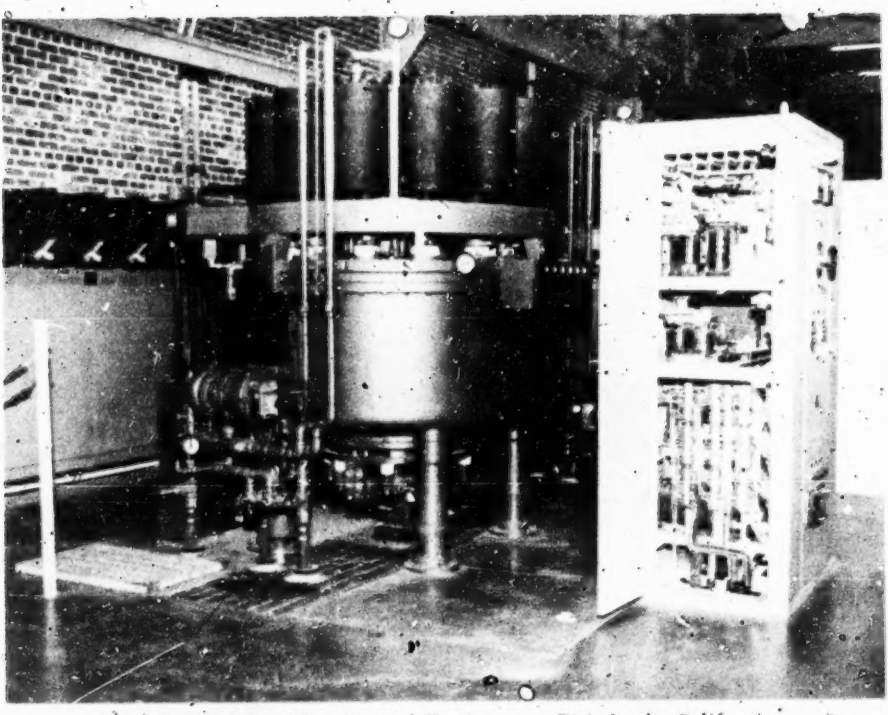
Appellant makes an attempt to show that the words "real property" in the "normal sense" includes only



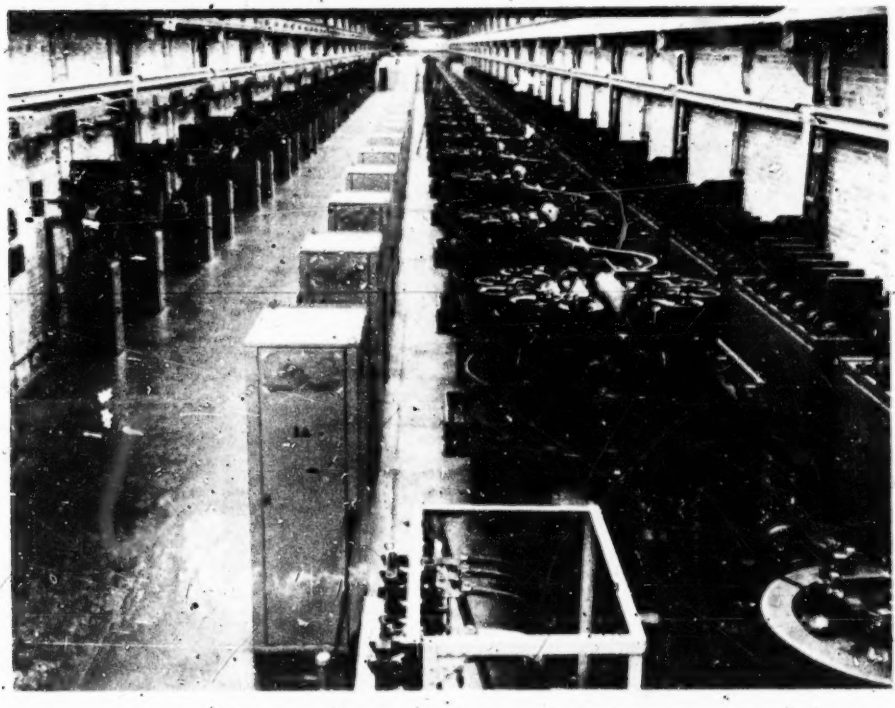
Aluminum Plant—Riverbank, California



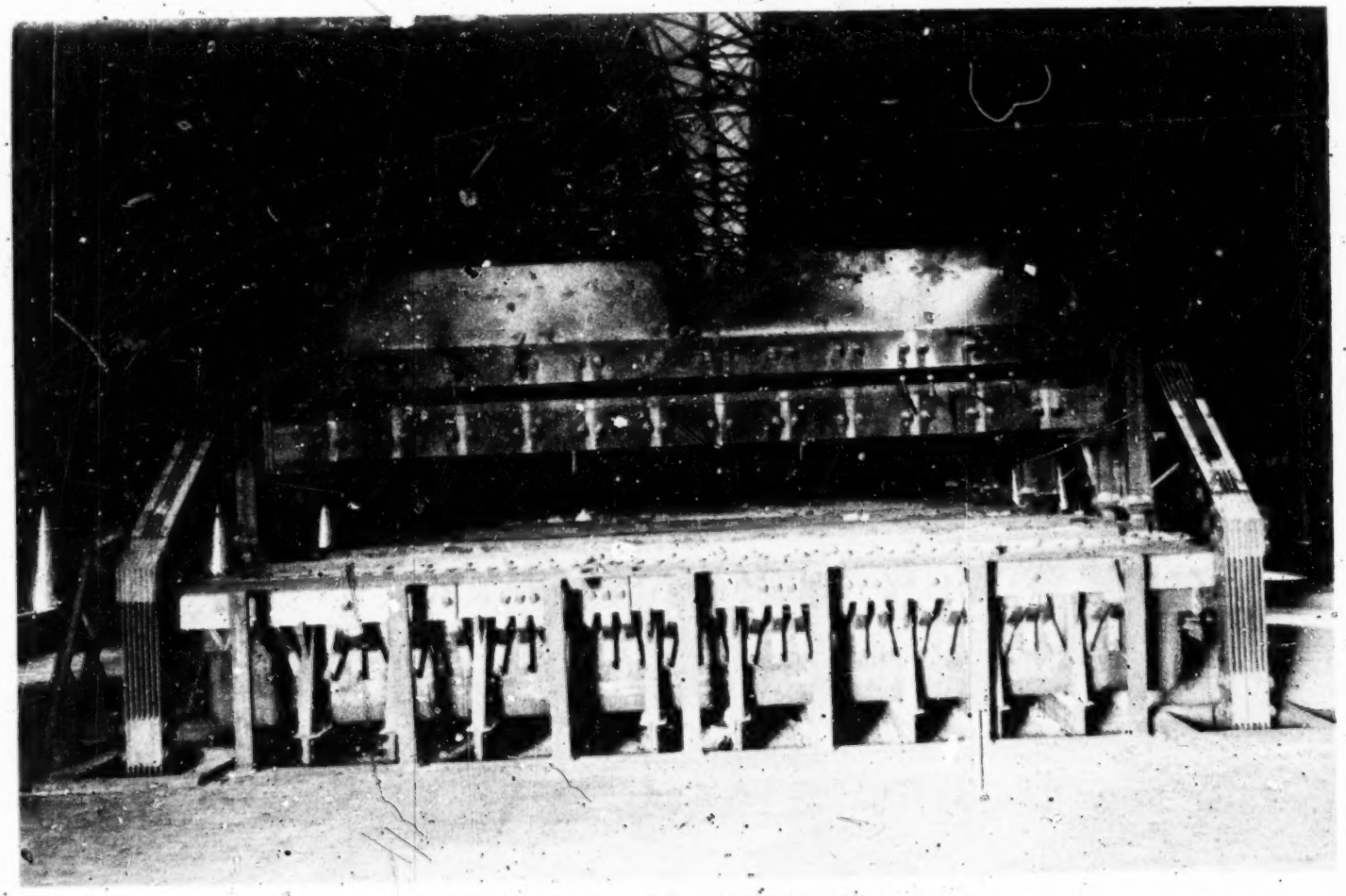
Ore Bin—Riverbank, California



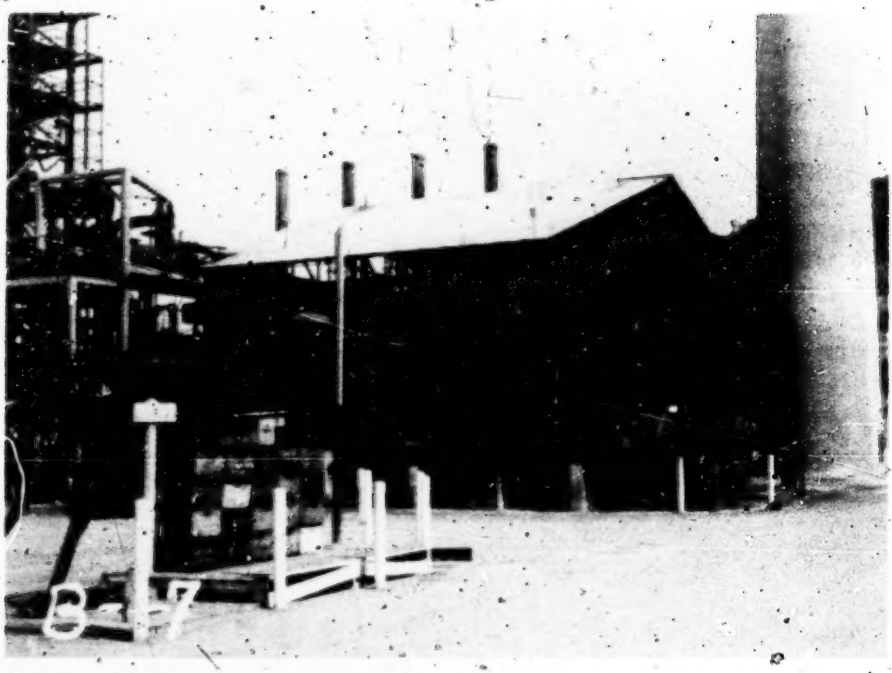
Rectifier and Rectifier Control Equipment—Riverbank, California



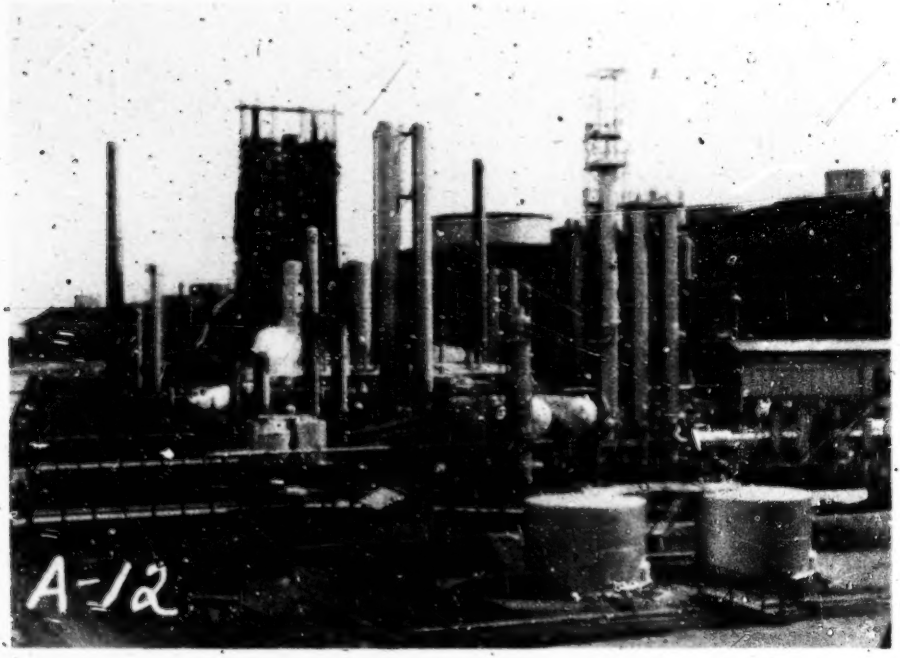
Circuit Breakers, Rectifier and Rectifier Control Equipment—
Riverbank, California



Aluminum Reduction Pots—Riverbank, California



Refinery Equipment—Richmond, California



Gasoline Refinery—Richmond, California

land and buildings. It further suggests that at common law a distinction was made between buildings and other improvements to real property.

It is perhaps true that prior to the industrial revolution some legal commentators defined "real property" as land and buildings. However, after man learned to construct structures upon land other than buildings this definition was abandoned and "real property" is now almost uniformly defined as including land and things affixed to the land. There is no basis in any of the modern decisions for the idea that a structure is an improvement to realty merely because it has four walls and a roof and that nothing else can become a part of the land.

Many structures erected on land today are far more massive than the ordinary building erected in Blackstone's day. Indeed Blackstone would no doubt have regarded Appellant's "movable" machinery as immovable. Without modern jacks, cranes, trucks, and railroads the lathes and grinders which Appellant states were moved from plant to plant would have been, in fact, immovable.

Opposite page 22 are two photographs of Appellant's Riverbank (California) aluminum plant. The cylindrical structures shown therein are bins in which the ore (in the form of a powder) was stored. The bins are bolted to concrete foundations and in Appellant's eyes may be removed without damage to the freehold. In spite of the fact that these bins tower above the buildings and in spite of the fact that they

support the conveyor belt housing (the structure on top of the tanks which is conceded to be real property) Appellant has insisted in the California courts that the bins are personal property.

Appellant, we submit, has thus reduced its own argument to an absurdity.

ii. The Common Law Meaning of the Words "Real Property"

Much of the discussion with regard to fixtures is unnecessarily complicated by the unnecessary use of words of uncertain meaning. Actually the terms "real property" and "personal property" describe the interests which individuals have in property. Congress, the State legislatures, and the courts generally have also used the term "real property" to describe land and improvements to land and the term "personal property" to describe chattels.

Chattels may be annexed to the land in such a way that they become part of the land, or improvements to land. A brick which is incorporated into a wall loses its identity as a brick altogether and becomes nothing but a part of a wall. On the other hand, an ordinary chair placed in a house retains its identity as a chair and does not become a part of the house. But lathes, grinders, presses, and drills, placed in a factory retain their identity as chattels, in a sense, because they are large and identifiable although they also become integral parts of the factory and therefore parts of the land.

When a tenant attaches machinery to his landlord's land, he can reserve the right to remove it by agreement. His rights to remove the property depends primarily upon the "intent of the parties." But if a dispute arises between a landowner and the sovereign in a condemnation suit, the intent of the landowner or the owner of the machinery is immaterial. If, from an examination of the premises, it appears that machines or other chattels have been so identified with the land as to be a part of it (or an improvement to it) the sovereign must take the annexed chattel and compensate the owner therefor as a part of the land. The intent of the owner is not controlling or material except as such intent is presumed as a matter of law from his actions.[6]

When the taxpayer deals with the sovereign, as represented by the local assessor, the same rule must be applied. If taxpayers are to be treated alike, their property must be treated alike without consideration of their actual state of mind or of their expressions of intent. A chattel so identified with the land as to appear to be a "fixture" must be taxed as "real property" even if its owner has reserved the right to remove it.

In most of the decided cases involving controversies as to the character of property as "real" or "personal," the dispute has had its genesis in rival claims of right in the disputed property, as between landlord and tenant, vendor and vendee, mortgagor and

[6] Compare *United States* v. *Bechtold Co.*, 129 Fed. 2d 473; *Jackson* v. *State*, 213 N. Y. 34; 106 N.E. 758.

mortgagee, mechanics lienor and conditional vendor and combinations of such relationships.

As between private claimants as to interests in the property the law seeks to enforce that result which appears to be most reasonable in the light of the individual case. Where possible, private agreements as to the character of the property are upheld. In those cases the intention of the parties prevails. But where such a result would work an injustice to third persons, the parties are frequently required to stand upon the inferences which their conduct has reasonably induced others to act upon. (See Bingham: Some Suggestions Concerning the Law of Fixtures; 7 Columbia Law Review 1.)

The Appellant is the sole and complete owner of the machinery and equipment involved in this case. The only issue is how the assessor shall regard it for purposes of taxation. The authorities unanimously support the proposition that assessing officers are entitled to rely exclusively upon the statutory guides and the physically perceivable facts in classifying annexed property as improvements or personal property.[7]

In *Bemis* v. *Shipe, supra,* the assessors assessed as improvements, a stationary saw mill. There was an

[7] *City of Pasadena* v. *County of Los Angeles* (1920), 182 Cal. 171, 187 Pac. 418; *Comstock* v. *Town of Waterford* (1911), 85 Conn. 6, 81 Atl. 1059; *Bemis* v. *Shipe* (1904), 26 Pa. Super. Ct. 42; *Pennsylvania Stave Co.'s Appeal* (1912), 236 Pa. 97, 84 Atl. 761; *County of Franklin* v. *McClean* (1927), 93 Pa. Super. Ct. 165; *People* v. *Wells* (1909), 135 App. Div. 644, 119 N. Y. Supp. 1057; *Guthrie* v. *Pittsburgh Dry Goods Co.* (1911), 47 Pa. Super. Ct. 384; Cooley, "Taxation," 4th Ed. Vol. 3, p. 2130. *Trabue Pittman Co.* v. *County of Los Angeles,* ___Adv. Cal. ___, decided April 9, 1946.

agreement between the owner of the mill and the owner of the land permitting the mill owner to remove any buildings erected. It was contended that this agreement gave the mill the character of personal property for tax purposes. The Court remarked (pp. 45-46):

> "The entire argument of the appellants is based upon the premise that because, as between the owners of the land and the owners of the mill, the latter can be called personal property, it is therefore personal property for all purposes, * * *.
>
> "It may be admitted that, as between the owners of the land and the owners of the mill, the latter may be regarded and treated by them as personal property, and yet it by no means follows that in contemplation of the law for other purposes it is not real estate * * *.
>
> "Under section 1, article nine of the Constitution, it is provided that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax'. This uniformity means equality of the burdens of taxation among the taxpayers of any municipality. It can scarcely be conceived that the legislature, even without such a constitutional provision, should intend to exempt from taxation a building upon one tract of land, because it happened to be erected upon a leasehold, *under a concession of the right to remove* it at the termination of the lease, and impose a tax upon a precisely similar building on an adjoining tract, because it was erected by the owner, and yet, if

the contention of the appellants is correct, that would be the inevitable result.

"If this be true of a sawmill, it would be true also of any other improvements of a permanent character, * * * and this carried to its logical conclusion, might remove any portion of the taxable real estate of any municipality from the grasp of the law for the purposes of taxation by a single agreement between the lessors and lessees that, as between them the lessees should be permitted to remove them at the expiration of the lease." (Emphasis added.)

The reason for this rule is obvious. Assessors may not be frustrated or hindered in performing their vital public function by the necessity of ferreting out the inchoate, undisclosed and often secret intentions of property owners as to its status. Cases involving the rights of innocent third persons, are therefore of the greatest assistance in ascertaining the law of fixtures for taxation purposes.

If Appellant were correct, the R. F. C. could determine the character of property belonging to it for purposes of taxation by any declaration in a lease that its machinery and equipment should be treated as personal property. Presumably Appellant would argue that the assessor would be bound by a similar declaration that its factory buildings were personal property, or a declaration that growing timber was personal property, or a declaration that minerals in place were personalty. If Congress had intended that R. F. C. and its subsidiaries were to

be free to determine the nature of their property for tax purposes, it could have simply authorized the State to tax so much of the corporation's property as the corporation desired. Congress did not confer this discretion upon the R. F. C.

An examination of the Appellant's Brief will disclose that while it advances the argument that Congress intended to permit the States to tax only land and buildings, it does not contend seriously that at common law the term "real property" included only land and buildings.

The Appellant recognizes that anything annexed to land which is adapted to the use of the property and which is annexed with the intention that it be a permanent accession to the freehold is a fixture and is a part of the land. The Appellant recognizes, too, that the first factor, the mode of annexation, is now of little importance. If a machine is so annexed to a building that it can not be removed without seriously damaging the building, all courts agree that the manner of annexation is strong evidence of an intent to make a permanent annexation. But the converse of this proposition is not true. Only a few States (New York, Vermont, and Arkansas) consider the fact that a machine may be removed without injury to the freehold as any evidence that there was no intention to annex it. In the eyes of almost all of the State courts the fact that a machine may be removed without damaging the property on which it rests is immaterial.

With respect to machinery the majority of the State courts place the greatest emphasis upon the adaptation of the machine to the use of the property with which it is connected. Adaptation to use is regarded as the strongest evidence of the intent to annex machines to property. While, as between parties to a contract, expressions of intent will control, the rights of third parties in connection with machinery are ordinarily determined upon the basis of whether or not the machine constitutes part of the plant.

In *Planters Mfg. Co.* v. *Greenwood Agency Co.*, 168 Miss. 892; 152 So. 476, 477, the Supreme Court of Mississippi held that an electric motor installed in place of an engine and boiler was part of the realty. The Court said:

> "The motor was not only thereafter used for the operation of the gins, but was installed in such manner as to make it a permanent part of the plant. *It could have been removed, as was the engine and boiler, without damage to the other machinery, but such is the case usually with the various component parts of any manufacturing establishment.* This motor, therefore, became part and parcel of the gin plant and was covered by the deed of trust thereon, and it is clear from the evidence that instead of impairing, it enhanced the value of the plant as a security for the debt secured by the deed of trust." (Italics added.)

In *Cunningham* v. *Curcton*, 96 Ga. 489, 23 S.E. 420, 421, the Court said:

"Our Code declares that 'realty or real estate includes all lands and the buildings thereon, and all things permanently attached to either.' 'Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Machinery not actually attached, but movable at pleasure, is not a part of the realty.' Sections 2218, 2219. As we have seen, the machinery in question was attached to the mill, and, as appeared from the plaintiff in evidence, was put there to remain permanently in its place, as a part of the mill. A portion of it consisted of shafting and belting used in the transmission of the motive power to the rest of the machinery; and the planer and the molder were heavy machines, held in place by bolts, and not intended to be moved about from place to place, but intended to be used permanently with the building. *Although it might have been removed without physical injury to itself or to the building, the machinery was of a kind essential to the completeness of the mill, for the purposes for which it was built and was being operated. It could not properly be regarded, therefore, as machinery 'movable at pleasure', in the sense intended by the Code.* If this language were interpreted in a literal sense, it would apply to almost every kind of machinery, and clearly such is not the intention of the law." (Italics added.)

The New Jersey Court reached the same result in *State of New Jersey* v. *Cruse*, 83 N. J. Eq. 232; 90

Atl. 673, 674, where it was held that machinery was part of a factory and as such was part of the realty. The Court said:

> "The building in which the machinery and appliances were contained was used by Cruse, and mortgagor, as an engineering and machinery shop and factory for the machinery and fabrication of iron and steel materials and construction work. The articles in question were installed by the mortgagor and were fitted for and intended to be, and were, used by him in the carrying on of that business on the mortgaged premises, and for that purpose were affixed to the ground and building. *They were removable without injury to the real estate, but this circumstance is of little moment. They were integral parts of a common plant, and with the building formed a unit for the prosecution of a common purpose.* Undoubtedly they were intended by the mortgagor to remain indefinitely, and were designed by him to be, not a temporary, but a permanent, accession to the freehold. Speiden, Receiver, v. Parker, 46 N. J. Eq. (1 Dick.) 292, 19 Atl. 21; Feder v. Van Winkle, 53 N. J. Eq. (8 Dick.) 370, 33 Atl. 399, 51 Am. St. Rep. 628; Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. (21 Dick.) 305, 58 Atl. 409, 105 Am. St. Rep. 640; Prudential Ins. Co. v. Guild, 64 Atl. 694." (Italics added.)

In *State* ex rel *Gisholt Machine Co.* v. *Norseman*, 168 Wis. 442, 169 N.W. 429, a tax case, the Court held that machinery adapted to the purposes of a manufacturing plant and connected to the building only by

wires and belts was part of the realty. The Court said:

"The effect of these decisions is that *when machinery adapted to the purposes of a manufacturing plant is installed therein and connected with the building by wires or belts, such machinery becomes a part of the freehold, and the land, buildings, and machinery so attached constitute an entity* and pass by deed, mortgage, or other conveyance of the land. This doctrine is so firmly written into the decisions of this court as to have become a rule of property in this state which it is our duty to respect and protect. * * *

"It is true that the question of whether property constitutes fixtures is largely one of intent. But *where property is adapted to the use to which the realty is devoted, the use thereof in such manner furnishes such strong evidence of intent to make it a part of the freehold as not to be overcome by bookkeeping practices.*" (Italics added.)

The same view was expressed by the Indiana court in *White* v. *Cincinnati, R. & M. R. R.*, 34 Ind. App. 287, 71 N.E. 276, 279. That case was a condemnation case. The Court applied the doctrine that the land, buildings and machinery (whether fast or loose) constituted a unit for use together. The Court said:

"The case at bar seems to have been tried upon the theory that a part of this machinery should be considered as part of the land, while a part of the machinery might not be so considered. It is clear from the record that the improvement upon the real estate consists not simply of certain buildings containing various pieces of machinery, but

of a paper mill—a thing complete within itself. Such machinery as is necessary and essential to a paper mill plant would be without value except as a part of a paper mill. Means were provided for utilizing the water power, buildings erected, and the machinery placed in position for the purpose of establishing a paper mill. It is not questioned that the buildings should be regarded as a part of the land. In such case there is no more reason for saying that the machinery necessary and essential for carrying out the purpose of the mill is a mere incident or accessory to the buildings than there is for saying that the buildings are incidents or accessories to the machinery. One machine essential in the manufacture of paper might be so annexed to or constitute such part of a building that it could not be removed; and another machine equally essential might be easily removed, and yet, when the two machines are separated, each is without value for the uses intended. In such case both of the machines should be considered as attached to the freehold—one by real and the other by constructive annexation. *As the machinery is permanent in its character, and, being essential to the purpose for which the buildings are used, is a fixture, it must be regarded as realty, and goes with the buildings. The land, water power, buildings, and machinery constitute a paper mill plant —a unit.* It has or has not a value as such, just as a building is valued, not by fixing a value on the different materials composing it, but as a building." (Italics added.)

In *Danville Holding Corporation* v. *Clement*, 178 Va. 223, 16 S.E. 2d 345, 350, 351, the Virginia Court

expressed the view that the intent of the annexor was to be ascertained primarily from the use to which the building and the machines were put, saying:

> "The character of a fixture is determined by the law of fixtures; that is, from *the external indications* which show whether or not it belongs to the buildings as an article designed to become part of it, and to be used with it, to promote the object for which it has been erected, or to which it has been adapted and devoted * * *. We are not unmindful that there are earlier cases which hold that where machinery has been installed in a building and may be removed without injury to the building, it retains its characteristic of personality; but it will be found in most of these cases that either the installation was only temporary, machinery not essential to the purpose for which the structure was devoted, or local policy controlled. (Italics added.)

The Nebraska Court has also rejected the idea that evidence of damage to the realty is necessary to show annexation and has held that adaptation of machinery to the use for which the property is devoted shows an intent to annex the machine to the property. In *Frost* v. *Shinkel*, 121 Nebr. 784; 238 N.W. 659, 671, the Court said:

> "Modern decisions in both England and America are against the old common-law doctrine that the mode of annexation is the criterion as to whether slight and temporary or immovable and permanent, and there is a tendency in favor of declaring things to be fixtures which are attached to the

realty with a view to the purposes for which it is held or employed. *First Nat. Bank* v. *Clifton Armory Co.*, 14 Ariz. 360, 128 Pac. 810, Ann. Cas. 1915A, 1061; 11 R.C.L. 1059.

"It should be a safe rule to say that *parts of property which are not physically attached to realty, but which are absolutely necessary to the operation of machinery and equipment which is physically attached, become themselves governed by the same rules as that which is annexed to the freehold.* And this court finds that this 1,400-pound lathe, placed therein by the owner before giving the real estate mortgage thereon, is a part of the realty belonging to the plaintiff." (Italics added.)

The Illinois Court, although using somewhat different language, also has come to the conclusion that it is immaterial that machines may be removed without injury to a building and that machinery which is a constituent part of a factory or shop and indispensable thereto is a fixture although not actually fastened. In *Kenny* v. *Artz Foundry Co.*, 308 Ill. App. 251; 31 N.E. 2d 620, the Court held that traveling cranes and other machinery and equipment were part of the real estate.

In a case involving equipment installed in an apartment house the Oklahoma Court has expressed its approval of the Pennsylvania rule saying:

"Also cited in the Bathgate Case (15 Okl. 87, 79 Pac. 903, 908), supra, is the case of Ege v. Kille, 84 Pa. 333, 340, in which the court said: 'The criterion of a fixture depends on the business for

which the premises are used. A fixture in a manufactory, mill, or colliery may have no adaptation to many other kinds of business. Although not attached, yet, if it be designated for the convenience of trade on the premises, and be so used, or subject to be called into use at any time, it becomes a fixture. If the article is indispensable in carrying on the specific business, it becomes a part of the realty. Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; Pyle v. Pennock, 2 Watts & S. 390, 37 Am. Dec. 517.'

"*Like the Pennsylvania court when it concluded in the first of the above-quoted opinions that a railroad machine shop would be incomplete, if not useless, without lathes, we here conclude that an efficiency apartment as generally constructed is incomplete if not useless with efficiency equipment* somewhat similar to the folding beds and kitchen units in question. A general hint of this fact is contained in the defendant's own testimony to the effect that even when he rented some of the partments 'unfurnished' these items were not removed. As we believe that such equipment is practically indispensable in carrying on the business and purpose of an efficiency apartment building like the defendants', we must hold that the equipment involved here became a part of the realty when installed in said building." (Italics added.)

This same conclusion has been reached in California where it has been held that presses, linotype machines, and other equipment necessary to the operation of a printing plant are part of the realty,[5] and that the equipment of a central office of a telephone com-

[5] (*City of Los Angeles* v. *Klinker*, 219 Cal. 198; 25 Pac. 2d. 826.)

pany included the portable stools used by the operators and the plugs used in making connections were part of the real estate."

International Trust Company v. *Palisade Light, Heat, and Power Company*, 60 Colo. 397; 153 Pac. 1002, was an action to foreclose a deed of trust. The Court held that the machinery involved was part of the real estate including some removable items and quoted with approval from the decision in the case of *Gibson* v. *McNichols*, 51 Colo. 54; 116 Pac. 1014 as follows:

> "When a building is erected for a particular purpose, and machinery placed therein reasonably necessary to effectuate that purpose, and in some substantial manner attached to such building, it becomes part of the realty."

The Montana Court in *Story* v. *Goldridge and Co.*, 106 Mont. 166; 76 Pac. 2d 73, held that a dredge was real property. In the course of its opinion it quoted with approval from its decision in *Shikler* v. *Potomac Copper Co.*, 69 Mont. 86; 220 Pac. 1097, 1100, where the Court said:

> "The intention mentioned in all authorities is not the secret intention of the person making the annexation but the intention dedicible as a presumption of law from the character of the chattel, the manner and effect of its annexation, its adaptability to the use of the realty, the purpose to which it is put, the relation of the parties, and the policy of the law."

(Southern California Telephone Company v. State Board of Equalization, 13 Cal. 2d. 127, 132; 82 P. 2d 442.)

The Michigan Court has expressed its approval of the Pennsylvania rule in a case involving the classification of an ice manufacturing plant. The Court said:

> "The ammonia compressors, aerating equipment, boilers, motors and refrigeration units, freezing tanks, air compressors, condensors, engines, oil tanks, and pumps, platform scales, scorching machines, and other machinery for manufacturing ice are fixtures * * *. We believe that this should also include spare motors, parts, machinery, equipment, etc. which constitute replacements specially adapted to the full enjoyment of the realty. See *Voorhis* v. *Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490."
>
> *Detroit Trust Co.* v. *City Service Co.*, 262 Mich. 14, 247 N.W. 76, 81.

Other courts which have adopted the rule that the nature of annexation of machinery is immaterial where it is an integral part of the plant include Delaware,[10] Iowa [11] and Kansas, where the court said, "all things used in a factory which are a part of the machinery necessary in the process of manufacture are fixtures."[12]

Louisiana reaches the same result through the application of the civil law, the courts of that State having concluded that machinery installed in a manufacturing plant is "immovable by destination".[13]

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[10] *Eq. Guaranty Trust Co.* v. *Knowles*, 8 Del. Ch. 106, 67 Atl. 961.
[11] *McGorrisk* v. *Dwyer*, 78 Iowa 279; 43 N.W. 215.
[12] *Cook* v. *Condon*, 6 Kans. App. 574; 51 Pac. 587.
[13] *Straus* v. *City of New Orleans*, 166 La. 1035; 118 So. 125.

The Massachusetts case of *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519, 23 N.E. 327, is frequently cited as a leading case for the proposition that machinery installed in a mill or manufacturing plant is, as against a mortgagee, a part of the plant and as such real property.

The Hopewell Mills case is followed in Maine.[14] Missouri follows the same rule.[15] The Oregon Court has indicated that the same rule would be applied.[16] And Alabama is in accord.[17]

In *Planters Bank* v. *Lummus Cotton Gin*, 132 S. C. 16; 128 S.E. 876, the South Carolina Court held that ginning machinery was part of the real estate. The Court held that the intention of the annexor was to be inferred from the nature of the article, the relation of the parties, the mode of annexation, and the purpose and use for which the annexation was made.

The Tennessee Court has held that machinery making up an ice plant was real property although it was merely bolted to the floor and was easily removable,[18] and in *Metropolitan Life Insurance Co.* v. *Jensen*, 9 N.W. 2d. 140, South Dakota Court followed the rule that machinery adapted to the use of a factory was a part of the realty in spite of the ease with which

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[14] *Gaunt* v. *Allen Lane Co.*, 128 Me. 141; 145 Atl. 255.
[15] *Globe Automatic Sprinkler Co.* v. *Boester*, 231 Mo. App. 202; 95 S. W. 2d. 285.
[16] *First State and Savings Bank* v. *Oliver*, 101 Ore. 42; 198 Pac. 920.
[17] *Southern Cotton Oil Co.* v. *Lowery*, 231 Ala. 119; 163 So. 629.
[18] *Union Bank and Trust Co.* v. *Fred W. Wolf & Co.*, 114 Tenn. 225; 86 S. W. 310.

it could be removed. The same result was reached in West Virginia.[19]

Opposed to this mass of authority are the cases decided by the courts of Ohio, Rhode Island and Vermont to the effect that production machinery remains a chattel although it is an integral part of an industrial plant. As a matter of fact, no State goes as far as does Ohio which, largely upon the basis of peculiar statutory provisions, has held that all production machinery is personal property for purposes of taxation.[20] New York holds that machinery installed in a building specially designed to receive it is an improvement to land and since much of the defense plant machinery is installed in specially designed buildings would treat it as taxable.[21]

Appellant's argument is that the intention of the parties controls. As between Curtis-Wright and Defense Plant the recitals in the lease are no doubt controlling. Private parties can as between themselves give property the attributes of real property or the attributes of personal property. But the vast majority of the State courts hold that parties to a contract can not determine the character of property as between themselves and third persons by mere agreements. Third persons, including tax assessors, are

[19] *Pocohontas Coal & Coke Co.* v. *By-Products Pocohontas Co.*, 112 W. Va. 390; 164 S. E. 504.

[20] *Zangerle* v. *Standard Oil Co.*, 144 Ohio St. 523; 60 N. E. 2d 59.

[21] See *In re Whitlock Ave.* in City of New York 278 N. Y. 276; 16 N. E. 2d 281; and compare Matter of *New York Telephone Co.*, 257 App. Div. 415, 13 N. Y. S. 2d 359; and see *Interstate Lien Corporation* v. *Schmidt*, 180 Misc. 910, 44 N. Y. S. 2d 709, holding trade fixtures to be taxable as real property.

entitled to rely upon appearances, upon the physical manifestations of intent rather than upon expressions of intent.

The installation of a machine in a factory and its use in the process of manufacturing is the strongest evidence of an intent to annex machines to the realty. We have shown that at least 30 States concur in this view and there are no doubt others who agree. In any event there are not more than half a dozen who have expressed any disagreement with the view.

The Pennsylvania Courts regard such evidence as almost conclusive evidence of an intent to annex the machine to the realty. The effect of the legislation in Pennsylvania has been merely to make installation in a factory conclusive evidence of that intent for purposes of taxation. While it may be true that the courts of no State have said that installation in a factory is conclusive evidence of intent to annex a machine, many have come close to it.

The Pennsylvania rule is one which is easily understood and one which can be easily and efficiently administered by local assessors and there are certainly few situations in which Pennsylvania would tax machinery and equipment as real property where the majority of States would not do likewise.

The record discloses (R. 45) that changes in design were responsible for most of the movements of the machinery in the Curtis-Wright Plant. As improvements were made in design, machines became obsolete and were moved out. The machines were not installed

with an idea that they would be moved until they did become obsolete.

It is a matter of common knowledge that changes in design require changes in machinery used in an automobile manufacturing plant. It is customary in that industry to group the changes so that a new model is placed on sale each year, but changes are made and machines are moved. Because in the manufacture of airplane propellers improvements in design were more frequent the machinery was moved more often. But there was no basic difference in the manner of installation, or in the intent of those installing the equipment. The difference was one of degree only.

We are not prepared to prophecy what results the courts of a majority of the States would reach if they were called upon to classify the machinery in the Curtis-Wright Plant. But it is relatively certain that almost all courts would hold that those machines which were bolted to concrete foundations were part of the land; that the overhead cranes were annexed and that the heavy machines held in place by gravity were annexed. Many would also hold that the electric trucks were constructively annexed.

There are no decisions which hold that the airplane industry is to be treated differently; that because of changes in design and movements of machinery in its plants its property is to be treated as personalty while similar machines installed in the same manner in similar plants used for manufacturing automobiles are real property.

Certainly there is no conceivable reason why Congress would have concluded that the line should be drawn between machines in airplane factories and machines in other factories.

Congress subjected the R. F. C. to the laws of the several States because it was satisfied that State Legislatures and State Courts were competent to determine when chattels had been so annexed as to become part of the land. The Pennsylvania rule is of long standing and differs little from the rule in other States. It is within the scope of the term "real property" as contemplated by Congress.

CONCLUSION

It is respectfully submitted that judgment should be affirmed.

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APPENDIX

CIVIL CODE, SECTION 659

Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

CIVIL CODE, SECTION 660

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

REVENUE AND TAXATION CODE, SECTION 104

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

REVENUE AND TAXATION CODE, SECTION 105

"Improvements" includes:

(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age.

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SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1945.

Reconstruction Finance Corporation, Successor to Defense Plant Corporation, Appellant, *vs.* County of Beaver, Pennsylvania.	Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[May 13, 1946.]

Mr. Justice Black, delivered the opinion of the Court.

By Section 10 of the Reconstruction Finance Corporation Act, as amended, 47 Stat. 5, 9; 59 Stat. 248, Congress made it clear that it did not permit states and local governments to impose taxes of any kind on the franchise, capital, reserves, surplus, income, loans, and personal property of the Reconstruction Finance Corporation or any of its subsidiary corporations.[1] Congress provided in the same section that "any real property" of these governmental agencies "shall be subject to State, Territorial, County, municipal, or local taxation to the same extent according to its value as other real property is taxed." The Supreme Court of Pennsylvania sustained the imposition of a tax on certain machinery owned and used in Beaver County, Pennsylvania, by the Defense Plant Corporation, an RFC subsidiary.[2] The question presented on this appeal from the Supreme Court judgment is whether the Supreme Court's holding that this machinery is "subject to" a local "real property" tax means that the Pennsylvania tax statute, 72 Purdon's Pennsylvania Stat. (1936) 5020-201, as applied conflicts with Section 10 of the Reconstruction Finance Corporation Act. This appeal, thus, challenges the validity of a state statute sustained by the highest court of the state and raises a substantial federal question. We have jurisdiction under 28 U. S. C. § 344(a) and appellee's motion to dismiss is denied.

[1] As to the Constitutional tax immunity of governmental properties see United States *v.* County of Allegheny, 322 U. S. 174. See also Pittman *v.* Home Owners Loan Corporation, 308 U. S. 21; Maricopa County *v.* Valley National Bank, 318 U. S. 357.

[2] 350 Pa. 520.

In 1941 Defense Plant Corporation[1] acquired certain land in Beaver County. It erected buildings on the property and equipped them with machinery and attachments necessary and essential to the existence and operation of a manufacturing plant for aircraft propellers. The plant, thus fully equipped, was leased to Curtiss-Wright Corporation, to carry out its war contracts with the government for the manufacture of propellers. Most of the machinery was heavy, not attached to the buildings, and was held in place by its own weight. Other portions of the machinery were attached by easily removable screws and bolts, and some of the equipment and fixtures could be moved from place to place within the plant. The lease contract with Curtiss-Wright authorized the government to receive and to replace existing equipment, and parts of the machinery appears to have been frequently interchanged and replaced as the convenience of the government required. The lease contract also provided that the machinery should "remain personalty notwithstanding the fact it may be affixed or attached to realty."

The government contends that under these circumstances the machinery was not "real" but was "personal" property, and that therefore its taxation was forbidden by Congress. The "real property" which Congress made "subject" to state taxation, should in the Government's view be limited to "land and buildings and those fixtures which are so integrated with the buildings as to be uniformly, or, at most, generally, regarded as real property." "Real property", within this definition would include buildings and "fixtures essential to a building's operations" but would not include fixtures, movable machinery, or equipment, which though essential to applicant's operations as a plant, are not essential to a building's operation as a building.

The county would, for tax purposes, define real property so as to treat machinery, equipment, fixtures, and the land on which a manufacturing establishment is located as an integral real property unit. This is in accord with the view of the state's supreme court which made the following statement in sustaining the tax

[1] By joint resolution of Congress, Ch. 215, Public Law 109, 79th Congress, Defense Plant Corporation was dissolved and all of its functions, powers, duties and liabilities were transferred to Reconstruction Finance Corporation. Pursuant to this joint resolution this Court granted a motion to substitute Reconstruction Finance Corporation as party appellant in succession to Defense Plant Corporation.

here involved: "It has long been the rule in Pennsylvania that 'whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it; and without which it would not be a manufactory at all, must pass for a part of the freehold' . . . Appellant's machinery, being an integrated part of the manufactory, and so of the freehold, was therefore taxable" under Pennsylvania's definition of real property. This interpretation of Pennsylvania's tax law is of course binding on us. But Pennsylvania's definition of "real property" cannot govern if it conflicts with the scope of that term as used in the federal statute. What meaning Congress intended is a federal question which we must determine.

The 1941 Act does not itself define real property. Nor do the legislative reports or other relevant data provide any single decisive piece of evidence as to Congressional intent.[4] Obviously it could have intended either, as the government argues, that content be given to the term "real property" as a matter of federal law, under authoritative decisions of this Court, or, as the county contends, that the meaning of the term should be its meaning under local tax laws so long as those tax laws were not designed to discriminate against the government.

In support of its contention that a federal definition of real property should be applied, the government relies on the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired. *Jerome* v. *United States*, 318 U. S. 101, 104; *Commissioner* v. *Tower*, No. 317, decided Feb. 25, 1946. But Congress in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each state and locality. For the several states, and even the localities within them, have diverse methods of assessment, collection, and refunding. Tax rates vary

[4] The 1941 amendments to Section 10 added, among others, the following provision: "... such exemptions shall not be construed to be applicable in any state to any buildings which are considered by the laws of such state to be personal property for taxation purposes." The government contends that this indicates a Congressional intent to establish a uniform meaning of the term "real property" regardless of local rules. But the addition also might be taken to indicate that Congress understood that without it under the language of Section 10 the local rule would be followed with respect to taxing buildings. In our opinion the addition of the above-quoted language does not tend to lead to one conclusion or the other.

widely. To all of these variable tax consequences Congress has expressly subjected the "real property" of the Defense Plant Corporation. In view of this express provision the normal assumption that Congress intends its law to have the same consequences throughout the nation cannot be made. Furthermore, Congress, had it desired complete nationwide uniformity as to tax consequences, could have stipulated for fixed payments in lieu of taxes, as it has done in other statutes.[5] Nor can we see how application of a local rule governing what is "real property" for tax purposes would impair the Congressional program for the production of war materials any more than the program would be impaired by the action of Congress in leaving the fixing of rates of taxation to local communities.

We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits, and laws. Local tax administration is geared to those concepts. To permit the states to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend. The fact that Congress subjected Defense Plant Corporation's properties to local taxes "to the same extent according to its value as other real property is taxed" indicated an intent to integrate Congressional permission to tax with established local tax assessment and collection machinery.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[5] See, *e. g.*, 42 U. S. C. 1546. See also list of Acts in *Federal Contributions To States and Local Government Units with Respect to Federally Owned Real Estate*, House Document No. 216, pp. 39,41.